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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC., ET AL., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APPENDIX

General Docket

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2-1-66—2-notice of appeal from Federal Communications Commission.

2-5-66—Appearance of Henry Geller and John H. Conlin for appellee. F.C.C.

2-5-66—Certified index to record. (n)

2-26-66—4-appellant's motion for leave to amend caption and title of notice of appeal. (m-23)

3-2-66—4-motion of Dr. Carl McIntire and Christian Beacon, a non-profit New Jersey corporation, for leave to intervene. (m-2).

3-9-66—Prehearing order approving stipulation.

3-9-66—1-prehearing stipulation; joint appendix to be filed at same time as petitioner's reply brief, or if none, within 15 days after filing of respondents' briefs.

3-9-66—Order granting appellant's motion to amend caption and title of notice of appeal.

3-31-66—Per Curiam order denying the motion of Dr. Carl McIntire and Christian Beacon, a non-profit New Jersey Corporation for leave to intervene. CJ, Bazelon; Fahy and Burger, CJ.

4-5-66—25-petitioners' brief and service.

5-2-66—1-brief for respondents.

5-10-66—25-respondents' brief and service.

5-10-66—4-motion of petitioners to extend time to file reply brief to May 27th. (C)

5-12-66—Order extending petitioners' time for filing reply brief to May 27th.

5-27-66—25-petitioners' reply brief and service.

5-27-66—25-joint appendix and service.

9-26-66—Argued before Wilbur K. Miller, Senior Circuit Judge, and Fahy and Tamm, Circuit Judges.

10-5-66—Letter from Clerk to all counsel requesting memoranda to be filed on or before October 15, 1966.

10-11-66—6-respondents' memorandum as to jurisdiction. (m-14)

10-17-66—7-appellants' memorandum of law as to jurisdiction.

11-22-66—Opinion per Senior Circuit Judge Wilbur K. Miller.

12-22-66—Separate dissenting opinion by Circuit Judge Fahy.

11-22-66—Judgment dismissing the petition for review of the action of the Commission.

12-6-66—4-respondents' motion to extend time to file petition for rehearing. (m-6)

12-12-66—Order extending respondents' time to file petition for rehearing to December 21st.

12-21-66—25-respondents' petition for rehearing *en banc*.

12-29-66—25-petitioners' answer to petition for rehearing.

3-13-67—Per Curiam order vacating opinions and judgment filed on November 22, 1966, by the court *en banc;* case shall remain with the assigned division of the court for a decision on the merits of the petition. Circuit Judge Robinson did not participate in order.

6-13-67—Opinion per Circuit Judge Tamm; Miller, Sr. CJ. did not participate in decision.

6-13-67—Separate opinion by Circuit Judge Fahy concurring in the result.

6-13-67—Judgment affirming the action of the Federal Communications Commission on review; Sr. Circuit Judge Miller did not participate in the consideration and decision of this case.

6-28-67—4-petitioner's motion to extend time to file petition for rehearing en banc to July 13th. (m-28)

7-3-67—Order granting petitioner's motion to extend time to file petition for rehearing en banc to July 13th.

8-10-67—Certified copies of opinion and judgment filed June 13, 1967, issued to the Federal Communications Commission.

9-6-67—2-petitioners' designation of record for certiorari. (m-6)

9-7-67—Certified record prepared.

9-12-67—Notice from Clerk, Supreme Court of filing of petition for certiorari on September 11th (SC Misc. 600 OT 67).

12-7-67—Certified copy of order from the Supreme Court granting petition for certiorari on December 4th.

12-12-67—2-petitioner's supplemental designation of record. (m-11)

[Filed Feb. 1, 1966]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RED LION BROADCASTING CO., INC., licensee of radio stations WGCB—AM-FM, Red Lion, Pennsylvania, and

REVEREND JOHN M. NORRIS, individually and as president and 80% stockholder of Red Lion Broadcasting Co., Inc., Post Office Box 88, Red Lion, Pennsylvania,

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION

UNITED STATES OF AMERICA

Respondents

Petition for Review of Order of the Federal Communications Commission and Statement of Reasons Therefor

(see order 3-9-66)

Appellants Red Lion Broadcasting Company, Inc., a Corporation organized under the laws of the Commonwealth of Pennsylvania, licensee of Radio Stations WGCB —AM-FM, Red Lion, Pennsylvania, and the Reverend John M. Norris as the President and 80 per cent stockholder of the Red Lion Broadcasting Company, give this notice of appeal under Section 402(a) of the Federal Communications Act of 1934 as amended, Title 47 USCA, from the actions of the Federal Communications Commission announced December 10, 1965, directing appellants to provide free time to Mr. Fred J. Cook for the purpose of answering a purported controversial attack on the said Mr. Cook by the Reverend Billy James Hargis, irrespective of Mr. Cook's willingness or ability to pay for such broadcast time.

The Commission after reconsidering its prior order of October 8, 1965 (Ex. "A") pursuant to appellants' Motion for Reconsideration dated November 8, 1965 (Ex. "B") has confirmed its position and on December 10, 1965 ordered appellants to grant Mr. Fred J. Cook the free broadcasting time as demanded in his complaint to the said Commission (Ex. "C").

Appellants are aggrieved and adversely affected by these actions of the Commission and each of the actions is unlawful and beyond the authority of the Commission as is more particularly set forth below.

II.

Aggrievement

The imposition of the so-called "Fairness Doctrine" as ordered in the instant case places unconstitutional restrictions on appellants' right to operate said radio broadcasting facilities.

III.

Statement of Reasons for Appeal

The grounds relied upon (as more particularly set forth hereinafter) are that the said Communications Act and the "Fairness Doctrine" as promulgated by the said Commission and applied to the appellants' operation is repugnant to Article 1, Section 1, and Amendments 1, 5, 9, and 10 of the Constitution, and its continued existence constitutes an unconstitutional restraint upon the rights guaranteed.

1. The statute under which the Federal Communications Commission has promulgated the "Fairness Doctrine" impairs free speech in violation of the First Amendment, by imposing a prior restraint upon the expression of views, arguments and opinions by the owner of the appellants'

radio stations and upon those who seek to pay for and use such facilities.

2. Said statute impairs the right of assembly and petition in violation of the First Amendment by compelling appellants to grant free use of their facilities to offset the effect of opinion expressed over such facilities by others who pay for the use thereof.

3. It infringes upon the right of free speech, petition and assembly of those who pay by increasing the costs to them so that the station owner may allocate an equal amount of time free of charge to those who seek the right of rebuttal.

4. This increased-costs factor constitutes a taking of property of the owner by reducing the number of users of such facilities as well as a taking of property of the user himself by charging such user a higher cost so that another may speak without cost.

5. Said statute is vague, indefinite, and uncertain and neither the statute nor the regulation promulgated thereunder contains any standards capable of ascertainment by those to whom they are directed; it thus infringes upon a fundamental principle that Congress may not in the absence of clearly ascertainable criteria delegate its legislative function to an administrative agency or officer.

6. The enforcement of such regulations is improper, illegal, arbitrary and capricious and threatens the loss to the appellants of valuable rights unless the appellants first surrender the exercise of basic rights guaranteed by the First Amendment, all in violation of the due process clause of the Fifth Amendment.

7. The original Communications Act of 1934 as amplified by the 1959 Amendment sub-section (b) (which incorporates the "Fairness Doctrine") imposes on the radio station owner a continuing liability for any possible libelous

statement made by anyone granted free broadcasting time. The imposition of this forced liability without granting the corresponding immunity provided in sub-section (a) of Section 315 of the said Act constitutes a taking of property without due process of law in violation of the Fifth Amendment to the Constitution.

8. The denial of the right of free speech particularly the right to criticize governmentenal policy and the temporary occupants of public office also violates the political rights guaranteed by the Ninth Amendment, as well as the most basic right reserved to the people by the Tenth Amendment.

THOMAS J. SWEENEY
/s/ ROBERT E. MANUEL
Robert E. Manuel
Suite 620 Shoreham Building
806 15th Street N.W.
Washington, D.C.
(Telephone RE. 7-4660)
Counsel for Appellants

ACKNOWLEDGMENT OF SERVICE (omitted)

Exhibit "A"

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

73281
ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY
IN REPLY REFER TO:
8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station W G C B
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign. Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary

either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack ". . . on an individual's or group's honesty, character, integrity, or like personal qualities . . ." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station

and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and this leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10) —simply because sponsorship is not forthcoming. CF. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission
/s/ Ben F. Waple
Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

Exhibit "B"

Zip Code - 17356 Phone Red Lion 244-3145
244-5360

AM WGCB FM
BOX 88
RED LION, PENNA.

1440 Kilocycles
1000 Watts

96.1 Megacycles
20,000 Watts

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion Broadcasting Company to provide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple

statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In response to Complaint of Democratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation*, a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour (it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the sub-

ject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action #2331-65) that the Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness

Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By JOHN H. NORRIS
John H. Norris,
Vice President

Copies to:

Chairman E. William Henry
Commissioner Robert T. Bartley
Commissioner Rosel H. Hyde
Commissioner Lee Loevinger
Commissioner James J. Wadsworth
Commissioner Robert E. Lee
Commissioner Kenneth A. Cox
Henry Geller, Esq., General Counsel

Exhibit "C"

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

77280
PUBLIC NOTICE—B
December 10, 1965

Report No. 5810

BROADCAST ACTION

The Commission, by Commissioners Henry (Charman), Hyde, Bartley, Lee, Cox, Loevinger and Wadsworth, took the following action on December 9. Commissioner Hyde abstained from voting; Commissioner Bartley dissented to issuance of the letter as presently written because it is too long and inaccurate; Commissioner Loevinger concurred in the ruling but not in the letter.

RESPONSE TO WGCB, RED LION, PA., REQUEST FOR RECONSIDERATION OF FCC FAIRNESS DOCTRINE RULING ON FRED J. COOK COMPLAINT

The Commission addressed the attached letter to Rev. John H. Norris, vice president of Red Lion Broadcasting Co., Inc., licensee of AM station WGCB, Red Lion, Pa., in response to his request for reconsideration and clarification of the Commission's October 8 fairness doctrine ruling on complaint by Fred J. Cook, of Interlaken, N. J., concerning a Billy James Hargis "Christian Crusade" program broadcast by WGCB in November 1964.

Attachment

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 65-1103
76921

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

IN REPLY REFER TO:
8427-A
11-186

December 9, 1965

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation*, entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . . "; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.,* FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19. Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315 (a)). This requirement is not satisfied by reference to what other media, such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute com-

pliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either

such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seek clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.,* 276 F. 2d 828, 829 (C.A. 5); *Fadell* v. *U. S.,* Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U. S.,* 337 U.S. 426, 432-440; *Caples Co.* v. *U. S.,* 243 F. 2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities."

See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid.;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6. Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 190, 227.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

[Filed March 9, 1966]

[Caption omitted]

Prehearing Stipulation

I. The undersigned parties, by their counsel, agree and stipulate that the following issues are presented by the petition for review in this proceeding:

1. Whether or not Section 315 of the Communications Act, as amended in 1959, adopted the Commission's "Fairness Doctrine" as set forth in the Commission's 1949 Report, "Editorializing by Broadcast Licensees," and if so, whether Section 315 constitutes an unconstitutional delegation of Congress' legislative function.

2. Whether the "Fairness Doctrine" as set forth above, is unconstitutionally vague, indefinite, uncertain and lacks the precision required when legislation which effects the basic freedoms guaranteed by the "Bill of Rights" is adopted.

3. Whether Section 315, as stated in (1) above, violates the Ninth and Tenth Amendments to the Constitution.

4. Whether the "Fairness Doctrine" violates the First and Fifth Amendments to the Constitution, and particularly, whether, under the facts of this case, the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the First and Fifth Amendments to the Constitution.

II. Counsel for the parties further stipulate that the Joint Appendix shall be filed at the same time as the Petitioner's Reply Brief, or in the event no Reply Brief is filed, within fifteen days after the filing of Respondents' Briefs.

III. In preparing the Briefs, the parties shall, when referring to record material, indicate the page, or pages, in

the original record where such material may be found. The pages of the Joint Appendix shall be consecutively numbered, and shall, in addition, bear appropriate record page numbers, so that the reference to the record material printed in the Joint Appendix may be found.

Respectfully submitted,

ROBERT E. MANUEL
Robert E. Manuel
Counsel for Petitioner

HOWARD E. SHAPIRO
Howard E. Shapiro
Counsel for Respondent,
United States of America

ROBERT D. HADL
Robert D. Hadl
Counsel for Respondent
Federal Communications Commission

[Filed Mar. 9, 1966]

[Caption omitted]

Prehearing Order

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938

RED LION BROADCASTING CO. INC., licensee of radio stations WGCB—AM-FM, Red Lion, Pennsylvania,

and

REVEREND JOHN M. NORRIS, individually and as president and 80% stockholder of Red Lion Broadcasting Co., Inc., Post Office Box 88, Red Lion, Pennsylvania, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA, *Respondents.*

Petition To Review and Set Aside an Order of the Federal Communications Commission

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JOINT APPENDIX

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(1)

1

722 Fernmere Avenue
Interlaken, N. J.
February 7, 1965

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

The purpose of this letter is two-fold: first, to thank you for sending me a copy of your February 1 letter to Maurice Dantin, of Columbia, Miss.; second, to register a complaint against a number of radio stations who are not living up to the FCC's "fairness doctrine."

The commission's position has been made clear, I think, not only in your letter to Mr. Dantin, but in previous rulings. There are, as I understand it, two basic principles involved here: first, stations carrying controversial programs attacking groups or individuals must notify those attacked of the nature of the charges; second, such stations must make available their facilities for a reply.

These two principles go back to the FCC order of June 1, 1949 which said: "When a controversial program involves a personal attack upon an individual or an organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response."

The first part of this rule requiring stations to notify persons attacked of the nature of the charges against them is being almost completely ignored. Of all of the stations carrying the Rev. Billy James Hargis' attack against me, just one, KXEN, in St. Louis, notified me of his remarks and sent me a transcript of them as the rule requires. I

have since learned through correspondence with some of the stations that the Rev. Carl McIntire made a similar attack upon me last fall over his network of several hundred stations, none of whom notified me of this. As a result, I still do not know what he said, and it is now too late to counter it.

So much for the first part of the FCC's fairness doctrine. The second part, involving the offer of a station's facilities for a reply, is being honored fully by many stations in my case, but many others are advancing an interpretation of the rule that can only result in circumventing it. They are insisting that they are not obligated to permit me to reply to Hargis unless I pay for the time.

In correspondence with several of these stations, I have pointed out to them that such an interpretation could result in virtually an air-wave blackmail racket. A station, if this were permitted, could air scurrilous and unfounded charges against an individual—and then make money by insisting that he pay to clear his name. I am certain from my own reading of the "fairness doctrine" that this is not at all what the FCC intended, and therefore I am filing this formal complaint against stations that have taken this attitude.

I shall name for you only stations that have acknowledged they carried the Hargis attack against me and then have refused to air my reply except upon a paid basis. These stations are:

(more)

KXEN in St. Louis—Though this was the one station that sent me a transcript of Hargis' remarks, it has refused to run my tape except on a paid basis.

WGFA, Watseka, Ill.—"Since the Christian Crusade program is sponsored on our station, you'll be required to pay the local five minute, one time rate which is $8."

(2)

WNKY, Neon, Ky.—"We will indeed grant you equal time to answer the charges Mr. Hargis brought out against you . . . This broadcast will cost you $7.50, which is our regular rate for 15 minutes."

WEYY, Talladega, Ala.—"We will be happy to give you amount of time you desire. Enclosed is our rate card."

KHIL, Willcox, Ariz.—"If our interpretation of the existing FCC regulation is correct, we are not required to grant you equal time at our expense, but will be happy to make available our expenses on a basis exactly like the Rev. Hargis for any reply to his allegations you may wish to make."

KBHC, Nashville, Ark.—"Yes, we do carry the daily fifteen-minute Christian Crusade program which is paid for by the Christian Crusade, if you would like equal time on this basis we will make the time available."

KBEN, Carrizo Springs, Tex.—"Time for this program is purchased by Christian Crusade. We will therefore grant you equal time on an equal basis at the exact fee paid by Hargis . . ."

WFDR, Manchester, Ga.—"We will be happy to offer you equal time on the same paid basis as we carry the Christian Crusade Broadcast."

WPHB, Phillipsburg, Pa.—"Christian Crusade pays rate card rate . . . Enclosed please find rate card for your convenience."

WGCB, Red Lion, Pa.—"Your suggestion that we grant you 'free time' for a brief reply, prompts me to ask what would happen if General Motors advertised the 'best car' and Ford then demanded 'free time' to inform our listener that they had been slandered." (How ridiculous can you get?)

KVOW, Riverton, Wyo.—Suggests I contact the Intermountain Network as they carried the Hargis program

"from the network on a paid basis." Implication seems to be the same as the others.

WJBS, DeLand, Fla.—"We are happy to make equal time available to you on the exact same basis as was made to the Christian Crusade program . . . If you will forward tape of your reply, accompanied by a check for $5, we will be glad to schedule it for broadcast."

KNOT, Prescott, Ariz.—"I totally reject your demand for time at our expense. Nowhere in the FCC regulations is there such a clause." This from Robert E. Baker, general manager.

KVIN, Vinita, Okla.—Encloses a rate card and says "you may buy as much as you like for as long as you like at the same rate charged Mr. Hargis."

WTTN, Watertown, Wis.—Time purchased by Hargis, offers time "under same conditions of broadcast."

KHEP, Phoenix, Arizona—"In view of lapse of time . . . ."

There are some other stations that appear to be having difficulty determining what to do about it, and I may write you about some of these later. But for the present, this is the list, and I respectfully urge that the commission notify these stations of its stand on the "fairness doctrine" and that doctrine's meaning.

Yours truly,

FRED J. COOK

(3)

3

Mr. Fred J. Cook
722 Fernmere Avenue
Interlaken, New Jersey

March 12, 1965

Dear Mr. Cook:

This refers to your letter dated February 7, 1965, in which you protest that Stations KXEN, WGFA, WNKY, WEYY, KHIL, KBHC, KBEN, WDFR, WPHB, WGCB, KVOW, WJBS, KNOT, KVIN and WTTN refused to grant you free broadcast time to rebut a personal attack against you aired in late November on the Billy James Hargis program, which these stations carry. You also state that these stations, excluding KXEN, failed to notify you of this attack or its substance.

We have enclosed for your information a copy of the Commission's letter of January 19, 1965, to radio Station WALG, in which the Commission sets forth its views regarding the station's refusal to air a response to a personal attack.

In addition, we have enclosed a copy of the Commission's letter of September 19, 1963, to Cullman Broadcasting Co., Inc., *et al,* in which the Commission set forth its views as to whether free time must be afforded to proponents of views opposed to those previously presented on sponsored programs. A careful reading of the entire letter should serve to place the Commission's policy in this respect in its proper context.

It is the usual practice of the Commission to associate complaints with our files on the station involved and to afford such station the opportunity to comment on the complaint. Accordingly, your complaint is being brought to the attention of the stations involved and they are being requested to submit a statement.

Your interest in writing is appreciated.

Very truly yours,

BEN F. WAPLE
Secretary

(4)

4

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

March 22, 1965

In Reply Refer to:
8425-A
2 238

Red Lion Broadcasting Co., Inc.
Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Gentlemen:

The Commission is in receipt of a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, stating that you refused free broadcast time to him to rebut a personal attack made upon him in late November over the Billy James Hargis program, which is carried by your station. Mr. Cook alleges you advised him:

> "Your suggestion that we grant you 'free time' for a brief reply, prompts me to ask what would happen if General Motors advertised the 'best car' and Ford then demanded 'free time' to inform our listener that they had been slandered."

The Commission has no independent information concerning the subject matter of the above complaint and it has reached no determination in the matter. In accordance with its practice of associating complaints with the files of the station involved and affording said station the opportunity to comment on the complaints, this matter is being brought to your attention. Your response should be submitted, in duplicate, within twenty (20) days from the date of this letter.

Very truly yours,

BEN F. WAPLE
Ben W. Waple
Secretary

(5)

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AM WGCB FM
BOX 88
RED LION, PENNA.

May 19, 1965

Mr. Ben Waple Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Mr. Fred J. Cook;
Your ref. #8425-A

Dear Sir:

Under date of March 22, 1965, you wrote us in regard to a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, alleging that he had been refused free broadcast time on our station WCGB to rebut an alleged personal attack made upon him in late November over the Billy James Hargis Program. You have requested that we comment on this complaint.

The Billy James Hargis broadcast to which Mr. Cook apparently refers was carried on this station on November 27, 1964. We received a letter from Mr. Cook dated December 19, 1964, to which we replied on December 28, 1964. A further letter dated December 31, 1964, was received from Mr. Cook to which we replied on January 7, 1965. Copies of these letters are attached.

It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to "sponsor" or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.

(6)

The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

A copy of this letter is being sent to Mr. Cook for any comment that he might care to make to us or to the Commission.

Very truly yours,

RED LION BROADCASTING COMPANY
REV. JOHN M. NORRIS, *President*

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722 Fernmere Avenue
Interlaken, N. J.
December 19, 1964

STATION WGCB
Red Lion, Pennsylvania

Gentlemen:

It has come to my attention that the Rev. Billy James Hargis in a radio broadcast for his Christian Crusade in late November made a personal attack upon me in which, among other things, he said:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959 showed that Fred Cook and his pal Eugene Gleason had made

(6)

up the whole story and this confession was made to District Attorney Frank Hogan."

The purpose of this inquiry is two-fold:

(A) Since your station is listed as one of those that has carried the Rev. Billy James Hargis' Christian Crusade broadcasts, did you in fact put on the air this attack against me made by the Rev. Billy James Hargis? I expect an answer, yes or no.

(B) If you did, this is to serve notice that I shall expect you to grant me equal time, at your expense, as provided in FCC regulations, to answer in appropriate fashion this slanderous and libelous attack.

Yours truly,

FRED J. COOK

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AM WGCB FM
BOX 88
RED LION, PENNA.

December 28, 1964

Mr. Fred J. Cook
722 Fernmere Avenue
Interlaken, New Jersey

Reference: Your Letter of
December 19, 1964

Dear Sir:

Our letters (copies enclosed) dated September 15th and October 20th, 1964 to the Democratic National Committee, and to the American Civil Liberties Union, dated October 22, 1964; explain the position into which we have been forced by recent requests such as yours.

(8)

Our rate card is enclosed. Your prompt reply will enable us to arrange for the time that you may wish to purchase.

Very truly yours,

W G C B Radio Stations

Rev. John M. Norris, *Owner*
Rev. John M. Norris, Owner

JMN:vp
ccs:
Interested Parties

To Our Friends:

The above is in reply to another sample of the harrassment to which we are now quite familiar.

Almost every week we receive some form of pressure, usually regarding "free time" to answer the so-called "Hate Groups."

J. M. N.

8

722 Fernmere Avenue
Interlaken, N. J.
December 31, 1964

Rev. John M. Norris
Owner, Radio Station WGCB
Red Lion, Pa.

Dear Mr. Norris:

Your letter of December 28, in response to mine of the 19th, arrived today. Unfortunately, it does not answer the first question that I ask you: Did you or did you not broadcast the attack that the Rev. Billy James Hargis made upon me in late November (one transcript that has come to my attention was dated Nov. 25)?

(8)

If you did not, there is of course no need for a reply; if you did, I submit that the least of your obligation in this matter is to grant me free time for a brief reply. Otherwise, it is conceivable that radio stations might be able to drum up a fairly good business by selling time to persons who have been slandered.

In any event, would you please give me an answer to the primary question: Did you or did you not carry this broadcast?

Yours truly,

FRED J. COOK

AM WGCB FM
BOX 88
RED LION, PENNA.

January 7, 1965

Mr. Fred J. Cook
722 Fernmere Avenue
Interlaken, New Jersey

Reference: Your letters of December 19th and 31st, 1964

Dear Mr. Cook:

Regarding your letter of December 31, 1964, we at a loss to understand your statement that may imply that we ought *not* to "drum-up business"—we could ask, "How else may we be expected to stay in business?"

Your suggestion that we grant you "free time" for a brief reply, prompts me to ask what would happen if General Motors advertised the 'best car' and Ford then demanded "free time" to inform our listeners that they had been slandered. This would soon remove all broadcasting from the realm of free enterprise, leaving only government subsidized and controlled radio. I am sure Mr. Cook, that you would not wish this to happen.

(9)

For your information, it was your article on "The Hate Club of the Air" which alerted us to several of these broadcasts which we later acquired, so that now we carry them all. Your article has resulted in cutting our deficit spending by almost one half, thus the harm that was intended has greatly benefited us.

As to the tape in question, we have run the tapes that we have received from Dr. Hargis. We doubt that he has discriminated against our Station in this instance.

Yours in His Service,

W G C B Radio Stations

Rev. John M. Norris, *Owner*
Rev. John M. Norris, Owner

JMN:vp
ccs: Interested Parties

9

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Reply Refer To: 8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign.

(9)

Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry, you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is

defined in our recent fairness primer as an attack ". . . on an individual's or group's honesty, character, integrity, or like personal qualities . . ." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

(10)

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.*, FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report*, Paragraph 10)—simply because sponsorship is not forthcoming. CF. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or

(10)

representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

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(Received Nov. 8, 1965)

AM WGCB FM
BOX 88
RED LION, PENNA.

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion Broadcasting Company to pro-

vide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In Response to Complaint of Democratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation*, a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour

(it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action #2331-65) that the

Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By JOHN H. NORRIS
John H. Norris, *Vice President*

Copies to:

Chairman E. William Henry
Commissioner Robert T. Bartley
Commissioner Rosel H. Hyde
Commissioner Lee Loevinger
Commissioner James J. Wadsworth
Commissioner Robert E. Lee
Commissioner Kenneth A. Cox
Henry Geller, Esq., General Counsel

(13)

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FCC 65-1103 76921

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427-A 11-186

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation,* entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . ."; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had preivously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken

by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.*, FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19. Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a)). This requirement is not satisfied by reference to what other media,

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such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute compliance with the fairness doctrine's requirements in the case of Mr. Cook.

(14)

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion

of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either

such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seek clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.,* 276 F. 2d 828, 829 (C.A. 5); *Fadell* v. *U.S.,* Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U.S.,* 337 U.S. 426, 432-440; *Caples Co.* v. *U.S.,* 243 F. 2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty,

character, integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6.

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Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 109, 227.

By Direction of the Commission
Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

77280 Public Notice—B

December 10, 1965

Report No. 5810

BROADCAST ACTION

The Commission, by Commissioners Henry (Chairman), Hyde, Bartley, Lee, Cox, Loevinger and Wadsworth, took the following action on December 9. Commissioner Hyde abstained from voting; Commissioner Bartley dissented to issuance of the letter as presently written because it is too long and inaccurate; Commissioner Loevinger concurred in the ruling but not in the letter.

RESPONSE TO WGCB, RED LION, PA., REQUEST FOR RECONSIDERATION OF FCC FAIRNESS DOCTRINE RULING ON FRED J. COOK COMPLAINT

The Commission addressed the attached letter to Rev. John H. Norris, vice president of Red Lion Broadcasting Co., Inc., licensee of AM station WGCB, Red Lion, Pa., in response to his request for reconsideration and clarification of the Commission's October 8 fairness doctrine ruling on complaint by Fred J. Cook, of Interlaken, N. J., concerning a Billy James Hargis "Christian Crusade" program broadcast by WGCB in November 1964.

Attachment

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Newsweek, Dec. 7, 1959

REPORTER ADMITS CHARGE OF SLUM BRIBE WAS LIE

Retreat of the Crusaders

The accusation by New York City's best-known team of crusading reporters blew up the biggest journalistic storm of the year.

It broke in the midst of a television talkfest—producer David Susskind's weekly "Open End" on WNTA-TV. In routine fashion, the TV panel was discussing "The Shame of New York," a recent 70,000-word exposé written for the weekly magazine The Nation by reporters Fred J. Cook and Eugene Gleason of The New York World-Telegram and Sun. Then suddenly, Cook made a startling allegation: When he and Gleason had been digging into the city's slum-clearance housing muddle for a World-Telegram and Sun series in 1956, a "high city official" had tried to bribe them to "get wise."

The bribe offer had been made to Gleason, who told him about it, Cook said. According to Cook, Gleason quoted the city official as saying: "What do you want? Seventy-five bucks a week, a hundred bucks a week? We can arrange it. We can put your wives on the payroll and you won't have to do anything for it, just stop looking."

Who was this high city official? Cook refused to say. But, panelist Gleason, who had agreed with Cook to have the bribe question brought up on the air, added that the official was still active in the city administartion.

And with that, as Gleason put it later, "the fat was in the fire." The background of the two newsmen gave weight to their charges. Both mild-mannered, 48-year-old Fred Cook ("the writing half of the team") and burly

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32-year-old Gene Gleason (the "reporting half") had won New York Newspaper Guild awards for their work. Cook was a veteran crime reporter, with fifteen years on The World-Telegram. And Gleason though with the paper only four years, had earned a reputation as a hard-nosed investigator, once praised by his editors as "tough physically . . . and mentally. No one awes him."

RETRACTION: But the next day, when the two newsmen were questioned by District Attorney Frank Hogan, Gleason retracted the whole story. He had made up the bribe offer, Gleason was quoted as having said, "because I was exuberant and carried away." In a six-page statement (he left without signing it), Gleason took full blame, explaining that Cook had only repeated what he had been told.

The World-Telegram and Sun promptly fired both reporters—Cook because he had "not told the city desk" about the alleged bribe offer. He insisted that he had reported the offer to city editor Norton Mockridge, at a lunch, "a few weeks afterward." But Mockridge said Cook had told him only about "pressures . . . in the form of job offers and favors proffered by one or more press agents who were close to City Hall." Mockridge added: "He didn't say anything about a bribe offer. He was just talking about little advances made by press agents. We laughed about it."

WAKE: But there was no laughter last week in The World-Telegram city room. "It was like a wake up there," a reporter said in describing the morning after Gleason's confession.

Fred Cook stood by the charges of corruption he and Gleason had made in their Nation article on "The Shame of New York." "But," he said, "you know people, and how they think. Now they're going to say, 'And how can we believe these two fellows?'"

Cook—a sympathetic figure to many of his colleagues—seemed bewildered by all that had happened. Why had Gleason, if the bribery charge was false, allowed Cook to bring it up on TV? "I've asked Gene several times," Cook said. "But somehow it's impossible for him to explain."

David Susskind was also puzzled. "I can't think how two grown, mature men would do this, would destroy themselves, without some pressure being exerted," Susskind said. "It seems there's a missing link somewhere."

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Reprinted From
THE NATION
May 25, 1964 . . 35¢

Radio Right

Hate Clubs of the Air . . . . . Fred J. Cook

Right-wing fanatics, casting doubt on the loyalty of every President of the United States since Herbert Hoover, are pounding the American people, this Presidential election year, with an unprecedented flood of radio and television propaganda. The hate clubs of the air are spewing out a minimum of 6,600 broadcasts a week, carried by more than 1,300 radio and television stations—nearly one out of every five in the nation—in a blitz that saturates every one of the fifty states with the exception of Maine.

The symbols on the map [page 525] represent cities in which radio or TV stations (or both) broadcast the doctrines of the rabid Right. It looks as if the nation were seized with a virulent pox. Some stations broadcast a single right-wing spell-binding program twice a day; many run three or four of the leading programs daily throughout the week, with television on Sunday. This loading of station logs with hate-club indoctrinations is generally un-

answered, for there are no comparable amounts of money, organization or broadcasting resources on the labor and liberal fronts. (For example, the well-known Edward P. Morgan program, sponsored by the AFL-CIO and released through A.B.C. radio network, is heard on only 231 outlets.)

The one-sided hammering at the American mind is made possible by two main factors: the enormous concentration of wealth and power in the hands of a few egocentric reactionaries like H. L. Hunt and J. Howard Pew, and the foundation tax dodge which permits such men to subsidize their propaganda at the expense of the rest of the nation's taxpayers. The importance of the foundation gimmick in financing the spate of radical Right propaganda becomes apparent when one takes a look at the major right-wing programs now being pumped out over the airways. Here is a compilation, made about the first of the year, of the major propagandists and their audiences:

Twentieth Century Reformation Hour. Sponsored by the tax-exempt Christian Beacon, Inc., this program carries the voice of the Rev. Carl McIntire of Collingswood, N. J., five days a week over 546 radio stations in forty-five states. McIntire is now, in the terms of airwave exposure, the No. 1 spokesman of the radical Right.

Life Line. This is the tax-exempt foundation set up by Texas oil billionaire, H. L. Hunt, to purvey his extremist views. Produced in Washington, D. C., and featuring the voice of Gene Scudder, a former federal employee, Life Line is now heard once (sometimes twice) daily on 325 radio stations and weekdays on sixty-nine TV stations in forty-two states and the District of Columbia. [See "H. L. Hunt: Portrait of a Super-Patriot," by Robert G. Sherrill, *The Nation*, February 24.]

Manion Forum. Created by Clarence Manion, former Dean of the Notre Dame law school and briefly a minor official in the Eisenhower administration, this program is

produced in South Bend, Ind., and heard weekly over 261 radio stations and three television stations in forty-one states and the District of Columbia.

HOWARD KERSHNER'S COMMENTARY ON THE NEWS. Produced by the Christian Freedom Foundation and bankrolled initially by more than $800,000 of tax-exempt Pew oil money, the Kershner commentary issues from 250 West 57 Street, New York, and is heard weekly on 362 stations in forty-one states.

DAN SMOOT REPORTS. An off-shoot of Hunt's first propaganda mill, *Facts Forum*, this program carries the voice of the former Fedaral Bureau of Investigation agent who was then Hunt's commentator. Smoot subsequently went into business for himself, established his headquarters in Dallas, and now purveys his message weekly over seventy radio and forty television stations.

AMERICA'S FUTURE. This so-called "educational institution," also tax-exempt, operates out of New Rochelle, N. Y. It is the radio arm of the arch-Right Committee for Constitutional Government, born back in New Deal days out of newspaper publishers' and big business' horror of the 40-hour week. It produces a 15-minute news commentary by R. K. Scott, once sales manager for a regional radio network in Raleigh, N. C. The importance of the program, carried now by 365 stations in forty-eight states, lies in its network status. Originally distributed by A.B.C., it shifted in 1960 to the Mutual network.

CHRISTIAN CRUSADE. Another foundation, its program is the property of the anti-Communist evangelist, Billy James Hargis. Bankrolled in 1962 by an estimated $1 million in tax-exempt income, Christian Crusade, from its headquarters in Tulsa, Okla., last year was distributing five days a week to fifty-five radio stations; in addition, a weekly television program was being carried by seven stations. This year, Hargis greatly expanded his operation. In his

monthly newsletter to the dedicated, he announced that on February 16, the Christian Crusade would be extended to more than fifty additional stations comprising the Intermountain Network and covering the states of Colorado, Wyoming, Montana, Idaho, Utah, Nebraska, Nevada, South Dakota and New Mexico. This, Hargis wrote, was "virgin territory for Christian conservatism," and he added: "The people who live in these states are generally 'fundamental Christians' and essentially patriotic . . . they need only guidance and inspiration to do battle on behalf of God and country. . . . No effort is more important than radio. . . . Local anti-Communist chapters are great, but for the most part they are patriots talking to patriots, while radio reaches the uninformed—those who have never heard."

RADIO EDITION OF THE INDEPENDENT AMERICAN. This 15-minute radio commentary carries the views of Kent and Phoebe Courtney, the New Orleans radical rightists who publish *The Independent American* and helped organize the Conservative Society of America. Thirty-nine stations in eighteen states carry the commentary.

CHURCH LEAGUE OF AMERICA. A weekly radio series originating in Wheaton, Ill., this endeavor began

in 1962 and now has a following over seventeen stations in eight states.

In addition to these major right-wing efforts, there is the Citizens' Council Forum, the air arm of Southern white supremacy. This is no mere local or regional effort. As far back as April, 1959, the Forum announced that its programs were being carried on television stations in ten states and that its radio programs were being heard over stations in thirty states. In its April-May, 1961, issue, the Forum bragged of sixty-four TV stations and 319 radio stations in forty-three states, and that, during 1960, it had

distributed 1,300 TV programs and 6,419 radio shows. With the intensification of the civil rights battle, this performance has been stepped up still further.

A propaganda effort conducted on such a scale, especially where expensive TV time and production is involved, implies a staggering sum of money. The backing comes from wealthy businessmen, presumably responsible leaders in their businesses and communities. Clarence Manion, for instance, who claims that is costs $6,000 a week to maintain his regular radio programs, has said that the money is given by 582 "leading industrialists, business and professional men." Even $6,000 a week is not enough to defray all of Manion's costs, for he often appeals for additional funds to back special projects. Such is the tab for just one of the right-wing programs. What the overall outpouring costs, no man can say with authority; but Wesley McCune, a former federal official and now director of Group Research, Inc., a Washington organization that checks on rightists, estimated last year that the air-wave propaganda budget was close to $20 million.

Except for the Citizens' Council Forum, dedicated primarily to the race issue, the themes and viewpoints of the right-wing broadcasts are almost identical and interchangeable, and their leadership is closely linked in the blood brotherhood of fanaticism. Though the organizations are autonomous, each encourages and promotes the products of the others, and the crossties of their leadership dramatize their identity of interest. Throughout the movement, the tie that binds seems to be that of the John Birch Society. The Birchitest may have been discredited in the majority of minds when their leader, Robert Welch, charged that President Eisenhower was a dedicated agent of the Communist conspiracy; but all the evidence shows the organization is far from dead—that, indeed, its views live on, promulgated by other mouths, and that it serves to coalesce the fanaticisms of the Right.

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Immediately after the assassination of President Kennedy on November 22, there was a temporary revulsion in America against the doctrines of hate. National leaders, the clergy and spokesmen for sanity in many walks of life emphasized that when fanatics tear down the image of the Presidency and foment doubts about the loyalty of the nation's most exhalted public figure, they create a climate of hate and unreason in which the unstable inevitably are incited to violence. This was so well understood that Thomas G. Aaron resigned as chairman of the Kentucky Young Americans for Freedom, saying: "I am now satisfied that the climate of political degeneracy and moral hysteria masquerading as 'true Americanism' bears substantial culpability for the murder of the President of the United States."

Ironically, in the weeks immediately preceding his assassination, one of President Kennedy's principal concerns had been this wholesale spawning of hate. The columnist Marquis Childs reported on October 10, 1963, that the President, in talking with an old and trusted friend, had "unburdened himself with considerable bitterness on the subject of top-bracket taxpayers and the tax-exemption they use to spread propaganda of the extreme Right."

But not even the tragedy of Dallas could move or deter the merchants of hate. Aides of the Democratic National Committee, who have been monitoring the broadcasts, report that the attempts to paint Kennedy with a Red smear (attempts that even alleged the Communists had chosen the members of his cabinet) are now being transferred with equal virulence to President Johnson. The attack takes the form that Mr. Johnson named Chief Justice Earl Warren to head the commission investigating the Kennedy assassination at the behest of the Communist organ, *The Daily Worker*. McIntire, Manion and Smoot, the Democrats say, "have all repeated this libel."

What are some of the other views being purveyed to the people of the nation in these dovetailing hate broadcasts?

They are, in essence: Get the U. S. out of the UN, and the UN out of the U. S. Abolish all foreign aid. Abolish unemployment compensation. Promote right-to-work laws, with the object of crippling and eventually wiping out labor unions. Impeach Chief Justice Warren—and other Justices of the Supreme Court. Abolish Social Security, a "socialistic" device; sell the Tennessee Valley Authority to private interests because it also is "socialistic"; fight integration; oppose medicare. And, though one has to be a bit deft about advocating this (and not all of them advocate it), "take care of" the Jews and the Catholics—and even that preponderance of the Protestant ministry which refuses to follow the doctrines of the hate peddlers.

In addition to this basic script, the individual propagandists have their pet peeves and prejudices—and their own mannerisms. Some are crude, some suave. But, in sum, they would roll back all of the social legislation of the last thirty years and, in the process, they would crush minorities and dissidents. To get the full impact, one must listen to a few of the individual voices in representative broadcasts.

The Rev. Carl McIntire, the deposed Presbyterian minister, a rabble-rousing voice on 546 radio stations, denounces the civil rights program as "serving the ends of radical powers that are working for a Socialist order in this free land." Behind the slogans "liberty" and "democracy," he sees the hideous visage of "planned economy." Brotherhood Week is a "gross perversion of Christian teachings." Roman Catholicism is the "greatest enemy of freedom and liberty that the world has had to face today." This is a surprise because, in McIntire's world, the National Council of Churches also qualifies for "the greatest enemy" title. It is "apostate, Communist and Modernist"; it is "the strongest ally of Russia and the radical labor movement within the U. S."

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December 31, 1964

MEMO FROM BILLY JAMES HARGIS

I have heard from several stations that carry our CHRISTIAN CRUSADE broadcasts of a demand for "equal time" under the "fairness doctrine" by Fred J. Cook. Although you may not have received a letter from Cook, I am writing this memo to all our stations for your information. Regarding Fred J. Cook and my broadcast mentioning him, I submit the following:

1. IF YOUR STATION CARRIES THE WEEKLY BROADCAST OF CHRISTIAN CRUSADE ONLY (30-minute program), the statement concerning Cook was not carried by your station in November, as he charges.

2. The broadcast to which Cook refers was a daily FIFTEEN-MINUTE Christian Crusade broadcast on November 25, 1964, at which time I said the following: "Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT'. Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government agencies . . . Now, among other things Fred Cook wrote for THE NATION, was an

article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right'!"

3. Fred J. Cook apparently was notified of this statement by the National Council for Civic Responsibility of the Public Affairs Institute, Inc., Washington, D. C. (which Arthur Larson heads), which sponsored a leftist smear broadcast designed to defeat Senator Goldwater prior to the election called "SPOTLIGHT". The program was dropped the day after Goldwater's defeat. Now Larson's anti-anti-communist group (they are not anti-communist but anti-anti-communist) is monitoring, by their own admission, all conservative anti-communist, religious or news broadcasts in order to harass the local stations with demands for equal time until all such programs are dropped by the stations. The very fact that Cook was not certain of the date of the broadcast or the stations that carried the program shows it was SECOND-HAND or HEARSAY, as far as he was concerned . . . and, in fact, had been PUT UP to his action of demanding equal time.

4. Regardless of Mr. Cook's denial, all of these things we said about him . . . and much more that could be said . . . are true. As proof, I am enclosing an exact copy of the exposure of Cook in NEWSWEEK Magazine, December 7, 1959.

However, for your information, I respectfully submit the following information on Mr. Cook (This material is taken from the National Review Bulletin published by William F. Buckley, Jr., 150 East 35th Street, New York City, New York, in a September 29, 1964, issue): "Grove Press claims the first anti-Barry Goldwater book of the campaign, 'Barry Goldwater: Extremist of the Right', by Fred J. Cook, a professional mudslinger who has written

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books knocking a) the FBI; b) the CIA; c) the 'ultra-right'; d) conservative commentators; but not Alger Hiss (whose story he thinks is unfinished). Since Cook was fired from the New York World Telegram for lying, on television, about having been offered a bribe by New York City officials, he has been writing mostly for The Nation."

Some of our stations have written to us telling us that their standard answer to these people wanting equal time on a free basis is that since Christian Crusade pays for its time, those people can have equal time also on a paying basis. This satisfies the Federal Communications Commission and stops the harasser.

If I can be of further service, feel free to call upon me as I am glad to be on your team. This organization has three attorneys . . . including the President of the Oklahoma Bar Association, LeRoy Blackstock . . . on permanent retainer, and I can assure you that we say nothing that we are not positive is true. In our fifteen years on national radio, we have never been sued for libel, neither has any of the stations that carry our broadcasts.

I am sorry if Cook has harassed you. You can now see just a little of what we go through in our defense of the Constitution and Christianity.

Yours for God and our children,

BILLY JAMES HARGIS
Billy James Hargis
Tulsa 2, Oklahoma

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LAW OFFICES OF
COTTONE AND FANELLI
1001 CONNECTICUT AVENUE
WASHINGTON 36, D. C.

March 11, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Station WGCB, Red Lion, Pa.,:
Complaint of the Democratic National
Committee (Ref. #8427-0)

Dear Sir:

Transmitted herewith, pursuant to the Commission's letters of February 10th and 25th, 1965, in a statement of Station WGBC in response to the complaint of the Democratic National Committee.

Please communicate with this office if any further information is desired.

Very truly yours,

BENEDICT P. COTTONE
Attorney for
Red Lion Broadcasting
Company

Enclosure

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Exhibit "A"

STATEMENT OF RED LION BROADCASTING COMPANY, INC.,
(STATION WGCB AM-FM, RED LION, PENNSYLVANIA)
IN RESPONSE TO COMPLAINT OF
DEMOCRATIC NATIONAL COMMITTEE

We have been informed that before the pending application for transfer of control of Stations WXUR AM-FM, Media, Pennsylvania, to Faith Theological Seminary may be further processed by the Commission, it is necessary that a reply be submitted immediately by Station WGCB, Red Lion, Pennsylvania, to a complaint filed by the Democratic National Committee (hereinafter DNC) against that Station, alleging violation of the Commission's so-called "fairness doctrine."

The complaint of the DNC, dated February 1, 1965, was apparently filed with the Commission on or about February 2, 1965. Under date of February 10, 1965, the Commission wrote Station WGCB as follows:

> The Commission is in receipt of a complaint from the Democratic National Committee stating that you refused to make available to it free broadcast time to rebut certain programs broadcast over your facilities concerning controversial issues of public importance. A copy of that complaint is enclosed for your information.
>
> The Commission has no independent information concerning the subject matter of the above complaint and it has reached no determination in the matter. In light of the Commission's "fairness doctrine" relating to the treatment of controversial issues of public importance and in accordance with its practice of associating complaints with the files of the station involved and affording said station the opportunity to comment on the complaints, this matter is being brought

to your attention. Your response should be submitted, in duplicate, within twenty days of the date of this letter.

Under date of February 12, 1965, Station WGCB, by Rev. John M. Norris, President and 80% stockholder of Red Lion Broadcasting Company, licensee of Stations WGCB AM-FM, wrote the Commission as follows:

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We have received our first official complaint from the FCC in nearly 15 years of broadcasting. We are amazed.

Since you have no independent information in this matter, and have reached no determination, and in the light of the Commission's so-called "Fairness Doctrine", we request an immediate hearing. I will make myself available at your earliest convenience.

Now well into my 82nd year, I have never before been subjected to such religious and political persecution. "Blessed are ye, when men shall revile you, and persecute you and shall say all manner of evil against you falsely, for my sake." Matthew 5:11.

On February 25, 1965, the Commission wrote to Rev. Norris, in part, as follows:

As you were previously advised the Commission has no independent information regarding the complaint. The complaint has not at present been scheduled for a hearing, but, instead, the Commission is endeavoring to secure information about it and to allow the licensees against whom the complaint was made to present their views. Accordingly, it is requested that you present your response to the complaint of the Democratic National Committee, in writing, within fifteen days of the date of this letter.

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The complaint of the DNC sent to WGCB with the Commission's letter of February 10, 1965, stated that the Committee, pursuant to the Commission's "fairness doctrine", requested and was refused time on certain stations carrying four programs in order to "present contrasting views concerning certain controversial issues of public importance treated on these programs." The Committee stated that there were attached to its complaint "copies of the transcripts of those programs which prompted the Committee's request, copies of the Committee's letters to those stations carrying the programs, and copies of the response of individual stations to those requests. The Committee further stated: "This material clearly identifies the programs and issues involved and the basis and nature of the Committee's requests."

Washington counsel was called by the Commission's staff on March 5, 1965, and was told that it was necessary that a response to the complaint be

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promptly submitted. He pointed out that neither he nor Station WGCB had been supplied with any of the attachments to the complaint and that a reply could not be submitted unless we were promptly furnished such attachments, at least to the extent that they applied to Station WGCB. The following day, our counsel received from the Commission the following material:

1. A letter dated September 5, 1964, from the DNC, which did not indicate the name of the addressee. In this letter, the DNC requested time to reply to two broadcasts on "The Dan Smoot Report". Scripts of these broadcasts (nos. 468 and 469) were included in the material sent to Washington counsel. The broadcasts were entitled, respectively, "Foreign Aid and Poverty" and "War and Politics—1964". Also, a letter dated September 21, 1964, requesting time for

reply to Dan Smoot Broadcast #472, dated September 7, 1964, entitled "Politics 1964." The script of this broadcast was included.

2. A script of a "Carl McIntire Broadcast of August 19, 1964, as Monitored by the Democratic National Committee." No letter from the DNC pertaining to this broadcast was included.

3. A script of "Life Line", Program #75, dated October 1, 1964, entitled "East-West Economies". No letter from the Committee was included.

4. A letter dated October 12, 1964, from the DNC, addressed to "Dear Sir", with no addressee indicated. This letter demanded time to reply to "Manion Forum", Broadcasts #516 of August 23, 1964, and #519 of September 13, 1964, entitled, respectively, "The Bureaucratic Bulldozer called Urban Renewal", and "The Next President Could Win the Cold War by Permitting Congress to Reveal Communist Subversives."

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Broadcast #516 was included in the material sent to Washington Counsel, but Broadcast [illegible] was not.

Since July 1, 1964, Station WGCB has received a number of communications from the DNC pertaining to broadcasts which, according to the Committee, dealt with controversial public issues, requiring the giving of time by the station for the broadcast of opposing views by the DNC. However, WGCB has at no time received from the DNC letters of September 5, 1964 and September 21, 1964, concerning Dan Smoot Broadcasts Nos. 468, 469 and 472, nor any letter concerning the "Manion Forum" Broadcasts Nos. 516 or 519. WGCB did receive from the DNC a letter postmarked September 5, 1964, which pertained to the Carl

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McIntire broadcast of August 19, 1964, and a letter dated October 16, 1964, pertaining to "Life Line" Program #75.

Correspondence between WGCB and the Democratic National Committee began on June 29, 1964. On that date, there appeared in *Broadcast Magazine* an item stating that the Democratic National Committee "has warned about 1300 radio and television stations that certain programs they carry 'have repeatedly attacked the candidates, programs and policies of the Democratic Party' and implied they could make the stations liable to claims for time to answer them." Reference was made to an article in *The Nation* on May 25th, entitled "Radio Right: Hate Clubs of the Air", which pertained to nine programs carried on stations throughout the country. On June 29th, Rev. Norris wrote to the DNC, pointing out that WGCB had not received the letter referred to in the *Broadcasting Magazine* article and asking that it be sent a copy of the letter. On July 1, 1964, WGCB received the letter from the DNC postmarked June 29, 1964, referred to in the *Broadcasting Magazine* article. DNC enclosed a reprint of the article in *The Nation* and stated: "In view of the coming political campaign, I thought you should be aware both

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of the contents of these programs and the claims for time to which these attacks can make you liable". Under date of July 1, 1964, Rev. Norris wrote to the Committee, criticizing the tactic of releasing its letter for publication in a magazine article on the same date its letter was mailed and before the letter had been seen by the stations concerned.

Under date of July 2, 1964, another unaddressed letter on the letterhead of the DNC and entitled "URGENT ATTENTION STATION OWNER OR MANAGER" was sent to WGCB. This letter referred to a broadcast by Dr. Carl McIntire which allegedly attacked the Committee's Deputy Chairman for Public Affairs and the Committee itself. It was

requested in this letter that the station "immediately transmit to me the text of these broadcasts and the offer of your facilities for an adequate response. In the event that you do not do so, the matter will be brought to the attention of the FCC". Another letter bearing the date July 3, 1964, and headed "URGENT ATTENTION STATION OWNER OR MANAGER" was received by WGCB on July 9, 1964. This letter stated that, on the date of the letter, another broadcast had been made by Dr. McIntire attacking the Deputy Chairman and the DNC.* The letter referred to the Commission's ruling that the text of attacks of this sort must be transmitted to the person or group attacked, together with the offer of facilities for an adequate response. The station was again warned: "Unless I hear from you promptly, this matter will be brought to the attention of the FCC".

On July 6, 1964, Rev. Norris wrote to the Committee's Deputy Chairman, stating that time was being offered to the DNC on the sponsored 20th Century Reformation Hour program, at no cost to the Committee. Rev. Norris pointed out that it was economically impossible for Station WGCB to make free time

available in answer to paid broadcasts without opening the floodgates to similar requests for free time to everybody. WGCB then received another letter from the DNC dated July 8, 1964, again headed "URGENT ATTENTION STATION OWNERS AND MANAGERS". In this letter, the Deputy Chairman stated that he had received the texts of the McIntire broadcasts and therefore no longer needed them. He stated further that he expected a specific offer of facilities for an adequate response, and, in anticipation, had prepared a thirty minute taped discussion "Hate Groups of the Air". Again it was stated ". . . in the event such an offer is not received, the entire matter will be brought to the attention of the FCC".

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* Both of these Dr. McIntire broadcasts were carried on WGCB.

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On July 9, 1964, Rev. Norris wrote the Deputy Chairman that the Committee's July 3rd letter had just been received, referred to his (Rev. Norris') prior letters, and thanked the Deputy Chairman for his "continued interest in the programming of this station". On July 21, 1964, Rev. Norris again wrote the Deputy Chairman, referred to the receipt of the Committee's July 8th letter, and pointed out that the station was still awaiting replies from the DNC to the station's earlier letters. In a letter dated July 31, 1964, the Deputy Chairman stated that he was preparing ". . . a report to the FCC regarding those stations that have failed to provide me with facilities to make an adequate response to these attacks". In an undated letter postmarked September 5, 1964, WGCB was advised by the Special Counsel to the DNC that in view of the fact that a thirty minute taped response of the Deputy Chairman had been broadcast in full on the 20th Century Reformation Hour, the Deputy Chairman ". . . has determined not to pursue this particular matter any further."

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By undated letter postmarked September 5, 1964, WGCB was advised by the Special Counsel to the DNC that during a portion of a 20th Century Reformation Hour broadcast, an attack had been made on Carl Rowan, the Director of the United States Information Agency. The Committee stated that it believed that an attack on Mr. Rowan was an adverse reflection on the character and quality of the presidential appointments of this Democratic Administration and its conduct of the foreign affairs of this nation." The Committee, therefore, requested WGCB to furnish time to "present its views concerning this controversial matter; unless, of course, you have already taken affirmative steps to present viewpoints contrasting to those broadcast over the program in question." By letter dated September 15, 1964, Rev. Norris replied that time to the DNC would be made available on a paid basis. Time for reply to the

alleged attack was offered to Mr. Rowan on the 20th Century Reformation Hour, without cost to Mr. Rowan or the DNC, but Mr. Rowan declined.

By letter dated October 16, 1964, the DNC referred to "Life Line" Program #75 on October 1, 1964, entitled "East-West Economies" in which statements were made which were allegedly "highly critical of the policy presently engaged in by the United States providing economic assistance to certain countries in Eastern Europe." The Committee stated its belief that this program was a controversial issue of public importance and requested time to present its views on this matter unless the station had already taken other steps to present contrasting viewpoints. By letter dated October 20, 1964, Rev. Norris referred to WGCB's previous letters, pointed out that the Committee was expending large amounts of money to buy radio and television time but that the only requests made by the Committee to WGCB, "a small, independent station," were for free time. Rev. Norris

in this letter informed the Committee that in the 1960 presidential campaign, when the 1960 Democratic Presidential nominee visited the nearby York Interstate Fair, WGCB offered free time to present him. This offer was rejected. WGCB was told that the two network stations in York had been given exclusive rights. (If desired, WGCB will provide the Commission with names, dates and other pertinent information concerning this incident.)

By letter postmarked October 27, 1964, from Mr. Lloyd Wright, Media Coordinator for the DNC, there was transmitted to WGCB by the DNC a tape containing political spot announcements with a suggestion that WGCB contact the local DNC to arrange for the purchase of time for these spots on WGCB. John Norris contacted Mr. Donald T. Puckett, the local DNC Chairman, who agreed to buy two spots on WGCB-AM and twelve spots on WGCB-FM. The

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total cost was $16.50. WGCB started to write a "thank you" note to Mr. Wright but before it was completed, the WGCB traffic manager was notified that the spots had been cancelled. Under date of November 10, 1964, Rev. Norris informed Mr. Wright that WGCB had gladly accepted the DNC's request for paid air time and in order to do so, WGCB had actually cancelled area business commercials; then, the DNC spots were cancelled.

In a letter dated January 28, 1965, the DNC referred to a Dan Smoot broadcast allegedly attacking President Johnson's education proposals. The Committee stated that it desired to know whether that broadcast was carried on WGCB and if so, what efforts had been made to present a broadcast favoring the President's education proposals. On February 2, 1965, Rev. Norris replied, raising a question as to whether the Committee's request was genuine in view of the Committee's failure to answer the many previous letters from WGCB offering time on a paid basis.

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By letter dated February 10, 1965, the DNC wrote to Rev. Norris stating as follows:

> Thank you for your reply to my recent letter.
>
> You will please note that I did not request that you make time available for a broadcast by the Democratic National Committee. I asked whether you had made any effort to comply with your obligations as a broadcast licensee to make facilities available for a program presenting views contrasting with those expressed by Dan Smoot.
>
> Have you?

The foregoing was the very first response over the period of over six months, that was received from the DNC to the many letters from WGCB offering time to the DNC on a paid basis. It is to be noted that until this letter, the

Committee had at no time ever specifically said that it did not care to use or to pay for the time. By letter dated February 13, 1965, Rev. Norris wrote the Committee that since the Committee did not want the time, WGCB would be glad to offer time, on the same terms as those offered to the DNC, to anyone suggested by the DNC qualified to answer Mr. Smoot. On February 16, 1965, the Committee replied, stating it knew no one "who would be interested in purchasing time on your station to present views contrasting with those of Mr. Smoot." He stated, however, that he knew where material could be obtained by WGCB at no charge and "perhaps you can find a sponsor to pay to have it broadcast." Rev. Norris was further informed "that the inability to find paid sponsorship does not relieve you of the obligation to make your facilities available for the presentation of contrasting views."

Until the Committee's letter of February 10, 1965 was received,

it appeared to be the Committee's position that *it* was the organization best qualified to respond to the McIntire, Smoot and other broadcasts since it regarded such broadcasts as critical of the Democratic Party and the Democratic Administration. On the previous occasions, it was made clear that "the Democratic National Committee requests time over your facilities" unless affirmative steps had already been taken to present contrasting views. Since the time was requested to reply to a paid broadcast, the station offered time to the DNC on the same basis. Without going into the question of whether the Commission's rulings *required* WGCB to give free time to the DNC or to seek out possible sponsors for reply broadcasts, or failing that, to select someone for reply broadcasts on a free time basis, it is clear that WGCB acted reasonably in attempting to ascertain first from the DNC whether it would pay for reply broadcasts.

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WGCB's policy on requiring payment for time sought in response to paid broadcasts, is not a matter of its own choice but has been dictated by strict economic necessity for survival. WGCB operates in a small community. It is a daytime-only station which must compete for revenues with two fulltime and one daytime station located in the larger community of York (6 miles), and another fulltime station in Hanover (18 miles). It has been at an economic disadvantage because of its limited and fluctuating hours. Until April, 1963, WGCB, being a regional station, had operated for almost thirteen years during pre-sunrise hours, beginning at 5:00 a.m. in the morning. During the pre-sunrise hours, it carried commercial programs which brought it substantial revenues; and a sustaining fifteen

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minute weekly program called "The Hour of St. Francis", a Catholic religious program,prepared and distributed by the Franciscan Order. On March 14, 1963, WGCB, without any prior notice, received a preemptory telegram from the Commission stating that because of a complaint of undue interference from a station in Worcester, Massachusetts, WGCB must cease pre-sunrise immediately.[1] No copy of the complaint was then, or ever, sent to WGCB by either the Worcester station or the Commission. Under this order, WGCB, after 13 years, immediately stopped operating pre-sunrise and overnight was forced to reorganize its entire programming operations. The revenues lost because of the curtailment of its hours was approximately 10% of its total revenues.

At the time that WGCB's pre-sunrise operations were terminated, the station was carrying three of the syndicated programs about which the DNC has complained re-

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1 The telegram was received just before WGCB's 6:15 P.M. sign-off time. The next morning's pre-sunrise programs were immediately cancelled. Since then, WGCB has been unable to start operating until as late as 7:30 A.M. in January, a loss of 2½ hours a day!

cently. These and other similar programs later added are a much-needed source of revenue to WGCB. For the station to carry certain programs on a paid basis and to give free time for so-called "answering broadcasts" upon the demand of a political organization which is seemingly financially able to pay for such time, particularly during an election campaign and particularly where the organization has not pleaded financial hardship, would simply mean that WGCB would be exposed to similar requests for free time not only from the sponsors of those broadcasts who are now paying for time, but by other political organizations. This could only

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result in serious losses of revenue to small stations like WGCB and could jeopardize their very existence.

Whatever the personal views of the ownership of WGCB may be on political, social and economic issues, it believes, just as strongly as the Democratic National Committee, that opposing views on controversial issued should be aired. Since September, 1962, Station WGCB has carried a program entitled "Freedom of Speech", in which any member of the public may express his views on any subject, controversial or otherwise.[2] This program is carried Mondays through Fridays, twice a day from 2:20 P.M. to 2:55 P.M., and from 4:45 P.M. to 5:15 P.M. Except for the winter months, when WGCB operates on a short broadcast day and when the later segment of the program must be curtailed, this program serves as a one hour daily forum throughout the year for the expression of all shades of varying viewpoints. This program has regularly served as a vehicle for the expression of views, sometimes strong and vehement, contrary to those which are expressed on the various paid broadcasts to which the DNC has objected.

The program is not pre-taped in advance and there is, of course, no script. Tapes of the program while it is in

[2] The program is locally sponsored.

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progress are not normally made, because of the obviously prohibitive costs. However, WGCB definitely states that, on the Freedom of Speech program, during the past six to eight months, views opposite to those on the McIntire, Smoot, Manion, Life Line and the other sponsored programs to which the DNC has objected, were expressed

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on the following subjects: Cuban Crisis; Urban Renewal; Civil Rights; Aid to Education; Medicare; Eldercare; U. S. Policy in Vietnam; Nuclear Test Ban Treaty; House Un-American Activities Committee, Co-Existive Peace with Russia; Admission of Red China to the United Nations, and many others. During the last campaign, many persons on this program expressed strong opposition to Senator Goldwater because they believed he was "triggerhappy, and will involve us in a war." Many other examples could be given. In addition, much of the wire copy news that is read verbatim on WGCB frequently includes expressions from government administration sources, Congressmen and other high public officials that are diametrically opposite to views expressed on the programs against which the DNC complains. This was very true in regard to the Nuclear Test Ban Treaty—the wire copy was predominantly and heavily in favor of views supporting ratification of the treaty. Wire copy, as a matter of invariable practice, is not edited by WGCB.

During the recent election campaign, on October 27, the Republican Congressional candidate, who was the then-incumbent, was at Station WGCB at the time of a "Freedom of Speech" broadcast. He was at once invited to appear for fifteen minutes on the program in a question-and-answer session. Immediately thereafter, a written invitation was sent to the opposing Democratic Congressional candidate (who was later elected) to appear on the program in the same way, either on October 29 or October 30. The invitation was not accepted.

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Finally, it is appropriate to relate, by way of contrast to the apparent position of the DNC in regard to the "fairness doctrine", an experience of WGCB with five national organizations concerned with civil rights. Under date of October 19, 1964, the Congress of Racial Equality, the American Jewish Congress, the American Civil Liberties Union, the National Association for the Advancement of Colored People, and the National Urban League jointly wrote WGCB concerning a "Dan Smoot" Broadcast #458 entitled "Communism in the Civil Rights Movement". WGCB was asked to make time available to the five organizations for reply. Rev. Norris, answering this letter on October 22, 1964, enclosed copies of his letters to the Democratic National Committee, dated July 6, September 15 and October 20 (discussed above), offered the five organizations time for reply on a paid basis, and pointed out the reasons why WGCB could not give free time. Under date of November 2, 1964, the following letter, on the letterhead of the American Civil Liberties Union, was written to Rev. Norris:

> We appreciate your recent letter acknowledging the request of the American Civil Liberties Union, Congress of Racial Equality, National Urban League and the American Jewish Committee for time to reply to the June 1 broadcast of Dan Smoot titled "Communism in the Civil Rights Movement." The groups have asked me to make this combined reply for them.
>
> We are grateful for your consideration of our request and plans are now being made to prepare a reply program. We felt that such a reply should not be finally prepared until we had some idea of the acceptance of our request, but we certainly plan to be in touch with you very soon.

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Thank you again for your understanding of the need to present the fullest discussion of public issues on the air.

/s/ ALAN REITMAN
Associate Director

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As Rev. Norris stated in his letter to the Commission of February 12, 1965, WGCB stands ready to face the Democratic National Committee at an immediate hearing on this matter.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By_____
JOHN M. NORRIS
President

March 10, 1965

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Received by the Commission May 3, 1965
As attachment to letter dated April 29, 1965 by KHEP

TRANSCRIPT OF TAPE RECEIVED FROM MR. FRED COOK 3/12/65

I am making this broadcast for two reasons. I want to set the record straight concerning a vicious attack made upon me and I want at the same time to call the attention of those who may have heard it to the technique of smear at the expense of truth. The ostensible reason for the attack by the Reverend Billy James Hargis in late November was a book I had written critical of the presidential candidacy of Senator Barry Goldwater. More than two weeks before the Hargis attack was aired, the American people had spoken and had repudiated the Goldwater candidacy by the most decisive popular vote in American history. Yet this verdict at the polls so freely and decisively given was not to be accepted as a clear plain fact

of life. It had to be explained in a way and the only way fanatics can explain a world that does not agree with their conceptions, in terms of plot and conspiracy. After mentioning me and my book, the Reverend Hargis developed this theme at considerable length attempting to show that persons and publications critical of Goldwater had all been somehow tainted with a virus of *communism*. Having set the scene in this fashion, he encircled back to me in these words—"Now who is Cook? Cook was fired from the New York World Telegram after he had made a false charge publicly on television against an un-named official of a New York City government. New York Publishers and Newsweek magazine for December 7, 1959 showed that Fred Cook and his pal, Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan." Observe the technique now employed here. This paragraph plainly says that I and my reporting partner together concocted a false story and it insinuates that I admitted this to District Attorney Hogan. As proof, it offers a specific reference to an accredited source, in this instance, Newsweek magazine. Now the one authority here is obviously District Attorney Hogan. After the Hargis attack, I wrote Mr. Hogan asking for a simple statement of the facts as they concerned me. He replied in a letter December 9, 1964. I quote,

> "Dear Mr. Cook: In reply to your letter dated December 7, 1964, I wish to state that this office did not make any statement reflecting on your integrity at a press conference on November 23, 1959 concerning Mr. Eugene Gleason, formerly a reporter for the New York World Telegram and Sun; nor for that matter, have we made such a statement at any time."
>
> "Mr. Gleason not only admitted in our office that the charge was untrue, but also completely exonerated you of all responsibility for the false accusation made on the television program."

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Those are the facts. They could have been easily ascertained by anyone desiring the truth. But what about the issue of Newsweek magazine that the Reverend Hargis cited? Those who heard him had no way of knowing, of course, that Newsweek did not say anything like what it was alleged to have said. I cannot stress too strongly that this is the tactic typical of a demagogue. To make a sensational charge, bolstering it with a citation of an honorable source, secure in the knowledge that his deceived listeners will accept, not check. Well, I invite my many listeners to go to the libraries and check the issue of Newsweek for December 7, 1959. They will find it agrees in all essentials with the summary of this affair I am giving you now. Gleason and I were a pair of crusading reporters who have been exposing corruption in New York City government. It would have been easier to live and let live without taking the risk we took, but no matter. Gleason, the reporting half of our team, the man on the street, came back to me on one occasion, and reported that we had been offered what amounted to a $5,000 annual bribe to go easy and to lay off. I told him, and he agreed, to turn down the offer instantly. Subsequently on a television program, I made a reference to this, and my partner under questioning, weakened and confessed he had exaggerated.

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I was probably the most stunned man in New York when this happened, and a Newsweek article reflects that. It also reported that I was, quote—"A sympathic figure" to many of my colleagues. Now I ask you, would you get any idea of this from the Reverend Hargis' distorted version. And if you agree you would not, if you agree, that the Reverend Hargis stooped in misrepresentation in this case, how much credence can you give to similar charges that he makes constantly against others. I have made this broadcast both to expose the falsity of the Reverend

Hargis' charges concerning me and the technique used in making them. But the basic issue is far more important than I am. It is very simply facts and truth versus the technique of smear, inuendo, the discrediting of a man by a label. We live in a time of crisis, in an age of complicated decisions. Those decisions should be made on a basis of facts and reason, not on the basis of labels designed to blot out facts and reasons and not on the basis of the distortions of a demagogue.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938

RED LION BROADCASTING CO., INC., ETC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Action of the Federal Communications Commission

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Decided November 22, 1966

Mr. Robert E. Manuel, with whom *Mr. Thomas B. Sweeney* was on the brief, for petitioners.

Mr. Henry Geller, General Counsel, Federal Communications Commission, with whom *Assistant Attorney General Turner, Messrs. John H. Conlin,* Associate General Counsel, *Robert D. Hadl,* Counsel, Federal Communications Commission, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent, Federal Communications Commission.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and FAHY and TAMM, *Circuit Judges.*

WILBUR K. MILLER, *Senior Circuit Judge:* In November, 1964, the petitioner's radio station, WGCB, broadcast a

paid program called "Christian Crusade," which included a discussion of the 1964 presidential election and of a book written by Fred J. Cook. The speaker, Billy James Hargis, in the course of his remarks, said:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney, Frank Hogan."

Cook complained to the Commission that WGCB had not notified him that this attack would be made, did not furnish him with a transcript or summary either before or after the program was broadcast, and refused his request for free time to respond. The petitioner had offered Cook time to reply to Hargis and had agreed to waive its customary charge therefor if Cook simply stated he was unable to pay for such a broadcast. Cook refused to say he was unable to pay, and insisted he was entitled to free time for reply, even if he could pay for the time involved.

On October 6, 1965, the Commission addressed a letter to the petitioner in which it said that a broadcaster must afford free time to reply to one who has been attacked as to his honesty, integrity or character and that, in the circumstances, Cook did not "have to make any showing or representation that he is financially unable to sponsor or pay for his reply time." The letter ended thus:

> "Accordingly, you are requested to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to the situation."

Red Lion requested reconsideration of this letter but, in another letter dated December 9, 1965, the Commission declined to reconsider. It reiterated its legal position, but did not order the petitioner to take any action. In fact,

no order of any kind has ever been entered in this matter. The effect of the December 9 letter was that the Commission was again requesting the petitioner "to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to this situation." The Commission has done nothing except, in informal correspondence, to expound its view on legal questions and to request a reply from Red Lion.

Red Lion appeals from the Commission's letter of December 9, 1965, which, it erroneously says, "ordered appellants to grant Mr. Fred J. Cook the free broadcasting time as demanded in his complaint to the said Commission."

In considering this matter, we are confronted by the threshold question whether the Commission's letters of October 6 and December 9 were final orders from which an appeal may be taken or judicial review sought. Pursuant to our invitation, the parties have submitted memoranda on the question in which they agree that the Commission's letters constitute final appealable orders. Their agreement does not end the inquiry, however, for the parties to a proceeding may not confer jurisdiction on a court where none exists. It is our duty to examine the question and decide whether jurisdiction exists, regardless of the parties' agreement that it does.

As we have said, all the Commission has done is to declare its position on legal questions and to request Red Lion "to advise the Commission of your plans to comply with the 'fairness doctrine', ..." Red Lion has not complied with the Commission's request and the Commission has done nothing further—it has not entered an order directing Red Lion to comply. We said in *California Oregon Power Co.* v. *Federal Power Comm'n*, 97 U. S. App. D. C. 263, 270, 239 F. (2d) 426, 433 (1956),

> "In all cases held reviewable, something was happening to the complainant. Either someone was doing something to him or he was placed under an obligation to do something. . . ."

Here nothing has been done to Red Lion and it has been placed under no obligation to do anything. It has merely been requested to advise the Commission of its plans.

We hold that the Commission's letters do not amount to final appealable orders and in fact are not orders at all. The Commission itself does not refer to them as orders but merely as declaratory rulings. It bases its right to issue such rulings upon Section 1.2 of the Commission's Rules, which provides:

> "The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

The trouble with the foregoing Rule is that it is not in accordance with Section 5(d) of the Administrative Procedure Act, 5 U. S. C. § 1004(d), which is as follows:

> "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

Thus it is seen that in formulating Section 1.2 of its Rules, the Commission went further than does the statute and attempted to give itself power to issue a declaratory ruling, such as those involved here, by substituting the word "ruling" for the word "order" in the statute. The Commission could not have regarded the words "ruling" and "order" as synonymous, for in that event it would have been unnecessary to discard the statutory word and choose another. It is quite apparent that the Commission's language in Section 1.2 of its Rules was a conscious effort to enlarge the authority given to it by the statute. This it may not do. We regard Section 1.2 of the Commission's Rules as null and void, and hold, therefore, that it furnishes no basis for the issuance of the letters of October 6 and December 9.

From what has been said, it follows that the declaratory rulings contained in the Commission's letters are not

orders from which an appeal may be taken or judicial review sought, and that this court has no jurisdiction to entertain this petition.

Petition dismissed.

FAHY, *Circuit Judge, dissenting:* The case presents a problem concerning the finality of action of the Federal Communications Commission required to give this court jurisdiction of a petition to review a Commission order under Section 402(a) of the Federal Communications Act of 1934,[1] Section 10(c) and (e) of the Administrative Procedure Act of 1946,[2] and Section 1032, Title 5 U.S.C.[3] This jurisdictional question was not presented by the parties when the case was briefed and submitted. Thereafter the court sua sponte requested memoranda on the question. Petitioners[4] and respondents complied, all urging that the Commission action sought to be reviewed is final. Though the parties cannot by consent confer jurisdiction I think their position that we have jurisdiction is sound.

By letter of March 22, 1965, the Commission informed Red Lion of a complaint, entered by Mr. Fred J. Cook,

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[1] 48 Stat. 1093, as amended, 47 U.S.C. § 402(a) (1964):

> (A) Any proceeding, to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in Chapter 19A of Title 5.

[2] 60 Stat. 242, 5 U.S.C. 1009(c), (e) (1964).

[3] 64 Stat. 1129 (1950).

[4] Petitioners are Red Lion Broadcasting Co., Inc. and Reverend John M. Norris, as president, 80% stockholder, and individually. They are referred to herein as Red Lion.

which might entitle Mr. Cook to radio reply time in accordance with the Commission's "fairness doctrine." Red Lion responded that free time would be made available only if Mr. Cook were unable to finance his reply. Then by letter of October 6, 1965, the Commission set forth the facts giving rise to Mr. Cook's request for reply time, Red Lion's denial thereof, and the requirements of the fairness doctrine. The letter concluded by requesting that Red Lion "advise the Commission of your plans to comply with the 'fairness doctrine,' applicable to the situation." Red Lion responded under date of November 8, 1965. It advised the Commission that it understood from the letter of October 6 that the Commission had directed Red Lion to provide Mr. Cook with free broadcast time to answer the alleged personal attack upon him which had given rise to the fairness doctrine issue. Red Lion referred to the Commission's rejection of its proposal to offer the free time upon Mr. Cook's statement that he was unable to pay for such a broadcast, and, further, requested advice as to the time for complying with "the Commission's directive." It also pointed out that in a court proceeding in the District of Columbia between Red Lion as plaintiff and the Commission and others as defendants, the Commission and the United States had referred to the Commission's letter of October 6, 1965, as constituting a final order. Red Lion stated that this apparently indicated that it was under a mandate from the Commission which if not complied with might subject it to revocation, forfeitures and possibly other penalties. The letter concluded:

> [W]e ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us of October 6, 1965.

Under date of December 9, 1965, the Commission responded. It reviewed Red Lion's contentions, adhered to its prior ruling, and stated:

The ruling is a "final order," in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision.

The letters of December 9 and October 6 placed Red Lion under obligation to comply as directed by the Commission if the Commission's action were valid. This I think constituted an order reviewable by this court. Though it were not described as an order, that would not be decisive.[5] The fact is, however, the Commission in its letter of December 9 to Red Lion described its ruling as an order. Moreover, it is a ruling which comes within the provisions of Section 5(d) of the Administrative Procedure Act, which read:

> The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

This provision is carried into the Commission's rules, Section 1.2, in the following language:

> The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

47 C.F.R. § 1.2.

The Commission's use in this regulation of "declaratory ruling" rather than "declaratory order" does not prevent a ruling under the regulation from being a declaratory order within the meaning of Section 5(d).

All parties, including the one against whom the ruling was made, understood that the Commission had decided

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[5] "'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing." Administrative Procedure Act of 1946, § 1(d), 60 Stat. 237, 5 U.S.C. 1001(d) (1964).

finally that Red Lion was under obligation to comply with the fairness doctrine, and had so notified Red Lion. This understanding is material on the interpretation to be given to the ruling. In any event the final decision placing Red Lion under obligation to comply is all that was required to bring the ruling within the court's jurisdiction on Red Lion's petition to review the ruling as an order.

The position maintained by the parties, with which I agree, finds support in *Isbrandtsen Co.* v. *United States*, 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55; *Brigham* v. *FCC*, 276 F.2d 828 (5th Cir.); *cf. Frozen Foods Express* v. *United States*, 351 U.S. 40.

In *Isbrandtsen* it is said:

> Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Thus, administrative orders are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." Under this test, a final order need not necessarily be the very last order. [Footnotes omitted.]

I respectfully dissent from dismissal for lack of jurisdiction.

[Filed Nov. 22, 1966]

[Caption omitted]

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the petition for review of the action of the Federal Communications Commission is hereby dismissed.

Per Senior Circuit Judge Wilbur K. Miller

Dated: November 22, 1966

Separate dissenting opinion by Circuit Judge Fahy.

Vacated by order of the court 3/13/67

[Filed Mar. 13, 1967]

[Caption omitted]

Order

On consideration of respondents' petition for rehearing *en banc* and petitioners' answer thereto, it is

ORDERED by the court *en banc* that the opinions and judgment filed herein on November 22, 1966, be vacated and this case shall remain with the assigned division of the court for a decision on the merits of the petition for review filed herein.

Per Curiam.

Circuit Judge Robinson did not participate in the foregoing order.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,938

RED LION BROADCASTING CO., INC., et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
RESPONDENTS

On Petition to Review and Set Aside an Order of the Federal Communications Commission

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Decided June 13, 1967

Mr. Robert E. Manuel, with whom *Mr. Thomas B. Sweeney* was on the brief, for petitioners.

Mr. Henry Geller, General Counsel, Federal Communications Commission, with whom *Assistant Attorney General Turner, Messrs. John H. Conlin,* Associate General Counsel, *Robert D. Hadl,* Counsel, Federal Communications Commission, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent, Federal Communications Commission.

Before WILBUR K. MILLER, *Senior Circuit Judge,* FAHY* and TAMM, *Circuit Judges.*

The action of the Federal Communications Commission is affirmed. Circuit Judge Tamm files an opinion. Circuit Judge Fahy files a separate opinion. Senior Circuit Judge Miller notes his non-participation in the consideration and decision of the case on the merits.

TAMM, *Circuit Judge:*

I. Earlier Proceedings in This Court.

Argument of this case, after a full briefing schedule, was conducted before this panel of the court on September 26, 1966. With Judge Fahy dissenting, the panel concluded that the "declaratory rulings contained in the Commission's letters are not orders from which an appeal may be taken or judicial review sought," and dismissed petitioners' action. Thereafter, the United States and the Federal Communications Commission petitioned for an en banc rehearing of the case, and a majority of the court voted in favor of the granting of this petition to rehear. A majority of the court, then en banc, voted to vacate the opinions and judgment filed by the panel on November 22, 1966, and directed the assigned division to consider the petitioners' action upon the merits.[1]

II. The Issues Presented.

A prehearing stipulation approved by the court in a prehearing order dated March 9, 1965, defined the issues agreed to by the parties to be:

1. Whether section 315 of the Communications Act of 1934, as amended in 1959,[2] adopted the Com-

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* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

[1] See court order filed with this court's clerk on March 13, 1967.

[2] Equal Time Act, 47 U.S.C. § 315 (1962); *amending* 48 Stat. 1088 (1934).

mission's "Fairness Doctrine" as set forth in the Commission's 1949 *Report, Editorializing by Broadcast Licensees,*[3] and if so, whether section 315 constitutes an unconstitutional delegation of Congress' legislative function.

2. Whether the Fairness Doctrine, as set forth above, is unconstitutionally vague, indefinite, uncertain, and lacks the precision required when legislation which affects the basic freedoms guaranteed by the Bill of Rights is adopted.
3. Whether section 315, as stated in (1) above, violates the ninth and tenth amendments to the Constitution.
4. Whether the Fairness Doctrine violates the first and fifth amendments to the Constitution and, particularly, whether under the facts of this case the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the first and fifth amendments to the Constitution.

III. Identity of Petitioners and Factual Background Creating the Present Controversy.

Petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB-AM-FM, Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. In November 1964, petitioners broadcast a fifteen minute program by a Reverend Billy James Hargis as part of a program series entitled, *The Christian Crusade.* The program included a discussion of the 1964 presidential election and a book concerning the Republican campaign entitled, *Goldwater—Extremist on the Right,* written by Mr. Fred J. Cook. During the course of the program and as part of the broadcast, Reverend Hargis made the following statements concerning Mr. Cook.

"Now who is Cook? Cook was fired from the New

[3] *Report of the Commission in the Matter of Editorializing by Broadcast Licensees.* 13 F.C.C. 1246 (1949).

> York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation* * * *. Now among other things, Fred Cook wrote for *The Nation* was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Extremist Of The Right.*"

Thereafter, Fred J. Cook wrote a letter to Radio Station WGCB inquiring whether Reverend Hargis had, in fact, made the above remarks. Cook requested time to reply to the Hargis remarks if they had, in fact, been made and specifically requested that the reply time be furnished at the expense of WGCB. In response, WGCB furnished Cook with its rate card so that he could arrange for the time he might wish to purchase and furnished him copies of letters which it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. A further exchange of letters occurred, after which, Cook filed a complaint with the Federal Communications Commission. In his complaint, Cook charged that Radio Station WGCB had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. Cook also charged WGCB was insisting upon payment from him for any reply broadcast. The Commission brought the complaint to the attention of Radio Station WGCB and requested an answer within twenty days. As a result of this letter, additional letters were exchanged between the radio station and the Commission. To permit

a full understanding of the resulting controversy, the pertinent letters are quoted below in their entirety as they were reproduced in the Joint Appendix filed by the parties in this case.

AM WGCB FM
BOX 88
RED LION, PENNA.

May 19, 1965

Mr. Ben Waple Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Mr. Fred J. Cook;
Your ref. #8425-A

Dear Sir:

Under date of March 22, 1965, you wrote us in regard to a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, alleging that he had been refused free broadcast time on our station WCGB to rebut an alleged personal attack made upon him in late November over the Billy James Hargis Program. You have requested that we comment on this complaint.

The Billy James Hargis broadcast to which Mr. Cook apparently refers was carried on this station on November 27, 1964. We received a letter from Mr. Cook dated December 19, 1964, to which we replied on December 28, 1964. A further letter dated December 31, 1964, was received from Mr. Cook to which we replied on January 7, 1965. Copies of these letters are attached.

It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to "sponsor" or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.

The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

A copy of this letter is being sent to Mr. Cook for any comment that he might care to make to us or to the Commission.

Very truly yours,

RED LION BROADCASTING COMPANY
REV. JOHN M. NORRIS, *President*

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Reply Refer To: 8427-A

October 6, 1965

Reverend John M. Norris, President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, "Christian Crusade", which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign. Mr. Cook alleges the discussion included the following personal attack against him:

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge

publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan."

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry, you said that your understanding of the requirements of the "fairness doctrine" is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack ". . . on an individual's or group's honesty, character, integrity, or like personal qualities . . ." in connection with a controversial issue of public importance. See part E, Personal Attack Principle, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance", 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the right to appear. *Cullman Broadcasting Co.,* FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the "fairness doctrine", applicable to the situation.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosure
cc: Fred J. Cook

AM WGCB FM
BOX 88
RED LION, PENNA.

November 8, 1965

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C.

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania, Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion-Broadcasting Company to provide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed "Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In Response to Complaint of Demo-

cratic National Committee" transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation,* a nationwide publication, entitled "Radio Right: Hate Clubs of the Air", with a warning concerning our alleged obligation to give free time to answer broadcasts by such "Hate Clubs". The article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour (it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled "Hate Clubs of the Air." Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the "fairness" in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cooke free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in "fairness," we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other "Hate Clubs", as he calls them, would we then be required to

give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission* et al. (Civil action #2331-65) that the Commission's letter of October 6, 1965 with reference to this matter ". . . constitutes a final order . . .". This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the "Fairness Doctrine" as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.

By JOHN H. NORRIS
John H. Norris, *Vice President*

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427-A 11-186

John H. Norris, Vice President
Red Lion Broadcasting Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania 17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook, in an article in *The Nation,* entitled "Radio Right: Hate Clubs of the Air", attacked "Billy James Hargis, his program, and his organization . . ."; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled "Hate Clubs of the Air"; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him "if he states that he is unable to pay for the time." In the circumstances, you state that fairness does not require the station to "give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook . . ."

We have held that "the requirement of fairness, as set forth in the *Editorializing Report,* applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine." *Letter to WSOC Broadcast Co.,* FCC 58-686, Ruling No. 11, "Applicability of the Fairness Doctrine in the Handling of Controver-

sial Issues of Public Importance" (herein called Fairness Primer) 29 F.R. 10415, 10418-19). Thus, the requirement of the statute is that the *licensee* "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (Section 315(a)). This requirement is not satisfied by reference to what other media, such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute compliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is will-

ing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See *Cullman Broadcasting Co.*, FCC 63-849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris,* FCC 63-851, p. 5, pointing out that the licensee "has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues." In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief

filed in the case of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission, et al.* (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 "constitutes a final order . . .", and seeks clarification as to the scope of the directive in that letter, and particularly "by what date Station WGCB is required to put on the broadcast." The ruling is a "final order", in the same sense as a ruling under Section 315 dealing with the "equal opportunities" provision. As stated in the enclosed *Letter to Honorable Oren Harris,* supra:

> ". . . the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the courts. Cf. *Brigham* v. *F.C.C.,* 276 F.2d 828, 829 (C.A. 5); *Fadell* v. *U.S.,* Case No. 14,142, (C.A. 7); *Frozen Foods Express* v. *U.S.,* 337 U.S. 426, 432-440; *Caples Co.* v. *U.S.,* 243 F.2d 232 (C.A.D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. . . ."

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal

attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420-21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid;* see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. *Report on Editorializing,* 13 F.C.C. 1246-1270, par. 6. Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. *NBC* v. *United States,* 319 U.S. 109, 227.

By Direction of the Commission

Ben F. Waple
Secretary

Enclosures
cc: Fred J. Cook

A formal order of the Commission, issued December 10, 1965, recited the addressing of the December 9 letter to the Reverend John H. Norris.

Petitioners thereafter filed in this court their petition to review the Commission's action. Petitioners' action constitutes the first direct court attack on constitutional grounds upon the Fairness Doctrine promulgated and executed by the Commission. It is to be noted, however, that this court has recently considered another case involving the Fairness Doctrine. See *Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

IV. Genesis of the Fairness Doctrine.

Mr. Justice Frankfurter, speaking for the Supreme Court in the landmark case of *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), succinctly but accurately outlined and documented the origin, development, and necessity for federal regulation of radio, which culminated in the Radio Act of 1927.[4]

The initial concept of a fairness doctrine certainly had its beginning in this Act, which first required that radio stations allot for campaign purposes equal time to opposing political candidates.[5] Two years later, the Federal Radio Commission extended the coverage of this statutory provision to all discussions of issues of importance to the public, *Great Lakes Broadcasting Company* v. *Federal Radio Commission,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 59 App. D.C. 197, 37 F.2d 993 (1930), *cert. dismissed,* 281 U.S. 706 (1930). Further implementation of the policy took the form of denial of licenses to radio stations using, or proposing to use, their facilities

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[4] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

[5] *Id,* Sec. 18, at 1170.

for the presentation of but one point of view. *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F.2d 850 (1932), *cert. denied*, 288 U.S. 599 (1933); *KFKB Broadcasting Ass'n.* v. *Federal Radio Commission*, 60 App. D.C. 79, 47 F.2d 670 (1931); *Chicago Federation of Labor* v. *Federal Radio Commission*, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 59 App. D.C. 333, 41 F.2d 422 (1930); *Great Lakes Broadcasting Company* v. *Federal Radio Commission, supra.*

The basic provisions of the Radio Act of 1927[6] were incorporated into the Communications Act of 1934,[7] within which was created the Federal Communications Commission.[8]

> "By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). (Footnotes omitted.)

Early in its existence, the Federal Communications Commission expressed approval of the policy established by the Radio Commission when, in *Young Peoples Association for the Propagation of the Gospel*, 6 F.C.C. 178 (1938), it denied application for a construction permit because of the applicant's policy of refusing to permit use of its broadcast facilities for the presenting of any viewpoint differing from that of the applicant.

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[6] See note 4, *supra.*

[7] Act of June 19, 1934, ch. 652, 48 Stat. 1064.

[8] 47 U.S.C. § 151 (1962).

Thereafter, the Commission adhered to the doctrine so established and, in fact, broadened the scope of its coverage, *Laurence W. Harry,* 13 F.C.C. 23 (1948); *WBNX Broadcasting Co.,* 12 F.C.C. 805 (1948); *Robert Harold Scott,* 3 P & F Radio Reg. 259 (1946); *United Broadcasting Co.,* 10 F.C.C. 515 (1945); *Mayflower Broadcasting Corp.,* 8 F.C.C. 333 (1941).

Chronologically at this point, the Commission initiated public hearings designed to reappraise and clarify the Fairness Doctrine. The hearings resulted in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, [hereafter referred to as the *Report*]. The *Report,* in effect, codifies earlier Radio Commission rulings, pre-*Report* rulings of the Federal Communications Commission, and the Commission's accumulated experience in fairness problems, crystallized after public hearings into a basic statement of the then scope of the Fairness Doctrine. Characterizing the broadcasters as "trustees" (*Id.* at 1247), who operate their facilities for the public at large, the *Report* promulgated the requirement that broadcasters, while permitted to editorialize, must seek a reasonably balanced presentation of all viewpoints on public issues of controversial importance.

The *Report* considered and discussed in considerable detail the Commission's authority to administer the Act under the statutory mandate of serving only the public interest, convenience, and necessity, 47 U.S.C. §§ 307a, 309 (1962), as well as the statutory prohibition of the Commission's power of censorship, 47 U.S.C. § 326 (1962).

Detailed quotation of these facets of the *Report's* contents is unnecessary for understanding of the chronology being here outlined. It suffices to say that in sum total the *Report* concluded that licensees of broadcast facilities, authorized to use but not to own, prescribed channels of transmission for a limited time, were required to devote a reasonable percentage of their broadcasting time to the

discussion of public issues of controversial importance. Moreover, the *Report* concluded that implicit in this requirement was the obligation to design and present this type of programming in such a manner that the public was afforded the opportunity to hear different and opposing positions and viewpoints on these public issues.

Noteworthy at this point is the fact that while the *Report* was based fundamentally upon the public interest standard and related statements in the Communications Act of 1934,[9] that Act substantially retained the provisions of the Radio Act of 1927 [10] relating to the allocation of equal broadcast time to opposing political candidates for public office.

A congressional inquiry into the application and operation of the Fairness Doctrine was undertaken in 1959 and resulted in the amendment of section 315.[11]

This congressional action was triggered by the Commission's rulings in interpreting the application of the then section 315 and the Fairness Doctrine to newscasts of political events by Chicago television stations, *Lar Daly*, 18 P & F Radio Reg. 238, *aff'd on reconsideration*, 18 P & F Radio Reg. 701 (1959). Congressional consideration of proposed amendments to section 315 grew out of dissimilar bills introduced in the Senate [12] and the House of Representatives.[13] The differences in the bills passed by each chamber resulted in the designation of a conference committee.[14] The resulting conference accomplished the clari-

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[9] See note 7, *supra*.

[10] See note 4, *supra*.

[11] See note 2, *supra*.

[12] S. 2424, 86th Cong., 1st Sess. (1959).

[13] H.R. 7985, 86th Cong., 1st Sess. (1959).

[14] 105 Cong. Rec. 16160, 16375, 16588 (1959).

fication of conflicting provisions of the proposed amendment of section 315 and the enactment of that section in its present phraseology.

Subsequent to the 1959 amendment of section 315, the Commission dealt with occurring problems and questions arising under the Fairness Doctrine on an ad hoc basis, as it had forecast in the *Report,* at page 1256. This experience with respect to fairness complaints resulted, on July 25, 1963, in the Commission's mailing to all broadcast licensees a Public Notice reiterating the obligation of all broadcasters to comply with the Fairness Doctrine, 25 P & F Radio Reg. 1899 (1963). This Public Notice stressed three factual situations arising under the Fairness Doctrine, including the licensee's obligation when a personal attack was broadcast, and specifically stated:

> "(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer, RR 951, 953)." 25 P & F Radio Reg. at 1900.

The Public Notice further advised licensees that the Commission had undertaken a study to consider what actions, either in the form of a primer or rules, would be appropriate in better defining a licensee's responsibilities under the Fairness Doctrine. The resulting study culminated on July 1, 1964, in a Public Notice identified as the *Fairness Primer,* 29 Fed. Reg. 10415 (1964). Although the Commission had earlier defined and elaborated on its procedures for handling fairness complaints, *Letter to Oren Harris,* 3 P & F Radio Reg. 2d 163 (1963), the *Primer,* after digesting its rulings on the Fairness Doctrine, reiterated the policy of dealing with each complaint on an ad hoc basis but also specifically set forth that in com-

plaints warranting Commission consideration the licensee would be afforded an opportunity to take action or to comment upon the complaint prior to disposition of the matter by the Commission, 29 Fed. Reg., at 10416.

Especially of interest in the present proceeding is the fact that the *Fairness Primer* contained a separate section devoted to the personal attack principle, 29 Fed. Reg. 10420-1. In substance, this section required all licensees in broadcasts attacking an individual's or a group's integrity, character, honesty, or personal qualities, in connection with controversial issues of public importance to take all appropriate steps to afford the person or persons attacked the fullest opportunity to respond.

I will now discuss, in the order in which they are enumerated in section II of this opinion, the several grounds upon which petitioners attack the Commission's action in the present case.

Discussion of the Four Stipulated Issues.

V. Did section 315 of the Communications Act of 1934, as amended in 1959, adopt the Commission's Fairness Doctrine as set forth in the Commission's 1949 *Report*, and if so, does section 315 constitute an unconstitutional delegation of Congress' legislative function?

In essence, petitioners charge that section 315 of the Act constitutes an unlawful delegation to the Commission of congressional legislative power. They argue, quoting from *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964), ". . . precision must be the touchstone of legislation so affecting basic freedoms . . ." and affix this quotation to their contention that the Fairness Doctrine infringes on constitutional guarantees secured by the Bill of Rights. Selecting from section 315 and from the Public Notice of July 1, 1964, *supra*, at 10415, such phrases as "reasonable opportunity," "sufficient time for full discussion"

of "controversial issues of public importance," "substantial importance to the community," "contrasting views of all reasonable elements," "of sufficient importance to be afforded radio time," "primary controversy," "affirmative duty generally to encourage and implement the broadcast of all sides of controversial issues," "shades of opinion," petitioners argue that Congress has illegally delegated its legislative authority because of the absence of adequate standards or ascertainable criteria and that Congress cannot adopt and make a part of the statute regulations of the Commission which, in turn, fail to meet the "preciseness" required in legislation affecting basic freedoms, citing *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438 (1963).

The factual and legal elements involved in *Aptheker* v. *Secretary of State, supra,* can be immediately distinguished from those elements found in the present case. In *Aptheker,* which involved travel restrictions upon members of the Communist Party, the challenged statute governed knowing as well as unknowing conduct. It lacked ". . . criteria linking the bare fact of [Communist Party] membership to the individual's knowledge, activity or commitment." 378 U.S. at 511. The challenged statute created an *"irrebuttable presumption* that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States," 378 U.S. at 511, and excluded "other considerations which might more closely relate the *denial of passports to the stated purpose of the legislation,"* 378 U.S. at 511, (emphasis supplied) (footnotes omitted). The Supreme Court, then, was compelled to find that the statutory provision *"judged by its plain import and the substantive evil which Congress sought to control,* sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and was not patterned as a regulation "narrowly drawn to prevent the supposed evil." 378 U.S. at 514, (emphasis supplied).

In contrast, the court has in the present case a statute and Commission regulations growing out of a licensing program addressed to the serving of the "public interest, convenience or necessity," 47 U.S.C. 307(a) (1962). The acceptance of this standard as a valid basis for the legislative grant of administrative power has been repeatedly upheld; *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 89-91 (1953); *National Broadcasting Co.* v. *United States, supra; Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* at 138; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276, 285 (1933); *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24-25 (1932). Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct. The court is dealing now with a set of reasonably concise and specifically enumerated prohibitions addressed to the evils they seek to guard against. See *Report, supra,* 47 U.S.C. § 315 (1962), and the *Fairness Primer, supra.* There are in this case no "irrebuttable presumptions," since provisions are afforded for the subjects of complaints to have an opportunity to comment or take action on a complaint before administrative action of the Commission. Most obviously the statutory provision, judged by its plain import and the substantive evil which Congress sought to control, is far removed from the stain of illegality found by the Supreme Court, speaking in *Aptheker, supra,* to exist in section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1951).

Turning to the substance of petitioners' argument under this heading, I observe the standard of evaluation of an exercise of its legislative power by the Congress to be whether "Congress has stated the legislative objective, has prescribed the method of achieving that objective . . . and has laid down standards to guide the administrative determination . . . ." *Yakus* v. *United States,* 321 U.S.

414, 423 (1944), and cases cited therein. There the Court also said:

> "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .
>
> "Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative comm[illegible]d." *Yakus* v. *United States*, at 424-5.

There appears to be no doubt but that the Supreme Court's references in *Yakus* to "an administrative officer" would apply equally and without qualification to a duly constituted administrative agency.

In reviewing the provisions of Title 47 U.S.C., I find clearly defined and explicitly enumerated statements of the legislative objectives, the enumeration of the method of achieving those objectives (*id est*, the creation of the Federal Communications Commission and the assignment

to it of specific and enumerated duties, responsibilities, and obligations), and the establishment of standards to guide the administrative determination. See section 309, "Application for license—Considerations in granting applications;" section 310, "Alien ownership as barring station license; assignment and transfer of construction permit or station license;" section 311, "Requirements as to certain applications in the broadcasting service—Notice of filing and hearing; form and contents;" section 312, "Administrative sanctions—Revocation of station license or construction permit;" and other similar sections.

Within the framework of 47 U.S.C. §§ 151-319 (1962), I find a full and complete determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. Relating these specifically to the provisions of section 315, I find in this portion of the statute a permissible delegation to the Commission of the "determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy" properly and legally empowering "the exercise of judgment." This allowable assignment of authority and responsibility, *Fairness Primer,* 29 Fed. Reg. 10415, constitutes a valid and proper formation of subsidiary administrative policy within the prescribed statutory framework.

Continuing to petitioners' charge that the Fairness Doctrine lacks the preciseness required in statutes "affecting basic freedoms." *N.A.A.C.P.* v. *Button, supra,* the Supreme Court, speaking in *National Broadcasting Co.* v. *United States, supra,* has effectively answered this question when it stated:

> "The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138. 'This criterion is not

to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . . *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285." 319 U.S. at 216.

Since the "public interest" is by statute and court decision a valid standard for the Commission's guidance, I find the necessary precision required by *Aptheker* in the situation arising in the present case. I conclude that the adoption by Congress of the Commission's Fairness Doctrine in its 1959 amendment of section 315 of the Communications Act of 1934 does not constitute an unconstitutional delegation of Congress' legislative function.

VI. Is the Fairness Doctrine unconstitutionally vague, indefinite, uncertain and/or lacking the precision which legislation affecting the basic freedoms guaranteed by the Bill of Rights requires?

Obviously, this question overlaps the discussion of the prior question, and petitioners' brief, as well as respondents' brief, duplicate in some measure the discussion of the present subheading and that of subheading V above. Again, from the starting point of the *Aptheker* case, *supra*, the petitioners, finding in their present situation a possible sanction, *id est*, the forfeiture of a valuable right to operate a radio station, seek solace from the fact that *Aptheker* involved penal sanctions. Claiming violation of their constitutional rights under the first and fifth amendments to the Constitution, petitioners argue that in applying the Fairness Doctrine to them, the Commission, having failed first to ascertain the truth of Cook's charges against them but requiring them, nevertheless, to afford Cook free time to reply to the Hargis broadcast, is abrogating their right to free speech in the dissemination of truth, if the

Hargis charges against Cook are, in fact, true. Continuing their argument to the allegation of a due process infringement, petitioners contend that the vagueness in the Fairness Doctrine, as it is herein invoked against them, violates the first essential of due process of law in violation of the fifth amendment. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

As noted earlier, this case presents the first direct challenge to the constitutionality of the Fairness Doctrine, although we took passing notice of it recently by observing ". . . that adherence to the fairness doctrine is a *sine qua non* of every licensee." *Office of Communication of the United Church of Christ* v. *Federal Communications Commission, supra,* 123 U.S. App. D.C. at 343, 359 F.2d at 1009.

The first amendment extends, of course, to broadcasting, as well as to other media of expression. *National Broadcasting Co.* v. *United States, supra,* but "(u)nlike other modes of expression radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to government regulation." 319 U.S. at 226. This court has had not infrequent occasions to consider first amendment challenges to various actions of the Commission. Thus, in *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 123 U.S. App. D.C. 300, 352 F.2d 729 (1965), we rejected the contention that the imposition of a non duplication condition upon a licensee was violative of the first amendment. Earlier, speaking in *Carter Mountain Transmission Corporation* v. *Federal Communications Commission,* 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied,* 375 U.S. 951 (1963), we rejected appellant's contention that the first amendment guaranteed the use of all means of public communication free of restraint or denial imposed by the Commission's ruling. Similarly, in *Henry* v. *Federal Communications Commis-*

sion, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), *cert. denied,* 371 U.S. 821 (1962), we denied a contention that the constitutional guarantee of free speech was abridged by a Commission ruling denying a license application upon the ground that the program proposals of the applicant were not designed to serve the needs of the proposed area. This court has made similar rulings in *Johnston Broadcasting Company* v. *Federal Communications Commission,* 85 U.S. App. D.C. 40, 175 F.2d 351 (1949); *Bay State Beacon, Inc.* v. *Federal Communications Commission,* 84 U.S. App.D.C. 216, 171 F.2d 826 (1948); and in *Simmons* v. *Federal Communications Commission,* 83 U.S. App. D.C. 262, 169 F.2d 670 (1948), *cert. denied,* 335 U.S. 846 (1948).

It appears to be well documented, then, that because of its unique characteristics the courts have consistently held that regulatory action by the Commission, acting within the framework and provisions of the statutes embraced in Title 47 U.S.C., does not per se violate the first amendment.

Looking specifically to the actual operation of the Fairness Doctrine as applied to these petitioners in this present case, I observe, first of all, that petitioners are not prohibited from broadcasting any program which petitioners think suitable. Moreover, petitioners are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting. The latitude of petitioners' operation of their station insofar as programming is concerned is limited only by petitioners' discretion and good faith judgment. See *Commission's Policy on Programming,* 20 P & F Radio Reg. 1901 (1960) and the *Report, supra.*

The Fairness Doctrine impact arises, then, when in petitioners' exercise of their own judgment, they broadcast a program dealing with controversial issues of public importance. After having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unre-

stricted programming, the Doctrine, rather than limiting the petitioners' right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast. Such an attack, the Doctrine directs, necessitates the petitioners' affording the maligned victim an opportunity to respond. Does such an obligation arising under these conditions deprive petitioners of any right guaranteed by the first amendment? I think not.

The American people own the broadcast frequencies. Speaking through their elected representatives in Congress, they have established a program of licensing the temporary use of allocated frequencies to broadcasters who meet the standards established by Congress in Title 47 U.S.C. as administered thereunder by the Commission. The broadcasters, then, acquire no ownership of assigned channels but are authorized to use them for the service of the public interest, convenience, or necessity. In keeping with the public interest, I agree with the Commission that:

> "It would be inconsistent . . . to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under Sections 307(a) and 309 of the act that the public interest, convenience, or necessity would be served thereby, *may themselves make radio unavailable as a medium of free speech.*" *Report, supra,* at 1248. (Emphasis supplied.)

Although addressing itself to a Sherman Act situation involving newspaper services, the Supreme Court's admonition in *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), appears to me equally applicable with minor changes in syntax to the present case:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted

> adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . That Amendment rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

My conclusion in this regard is uninfluenced by petitioners' contention that the Commission in some manner has an obligation to first ascertain whether the complaint made to the Commission by Cook was "in fact true or false." There is, of course, no statutory requirement for such a finding. Additionally, it is my view that any attempt by the Commission to make factual determinations of truth or falsity in controversial issues of public interest would constitute an illegal exercise of a nonexistent authority. The basic concept of free speech is unfettered by any requirement that it be exercised only by those with a "right" viewpoint:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire*, *supra*, pp. 571-572, [316 U.S. 568], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1948).

I reject the suggestion that the Commission has either the obligation, or even the authority, to make determinations of the right or wrong in factual disputes involving controversial issues of public interest.

The thrust of petitioners' challenge to the Commission action as an abridgement of their fifth amendment rights is rather difficult to specifically articulate. Briefing and argument combine and interweave the vagueness argument indistinguishably about both the first and fifth amendments. Specifically, we are told that arguments advanced by petitioners in support of the questions discussed in part V of this opinion also support the allegation that the "vice of vagueness violates the due process clause of the Fifth Amendment . . . ." (Petitioners' brief at 17.) As I have set forth under part V of this opinion, I do not believe that either the Fairness Doctrine or the statutory provisions from which it flows are lacking in any required standards of preciseness. My view is that the statutes and the Doctrine are sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to penalties. Neither the statute nor the doctrine either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. See *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1925). Moreover, broadcasters are protected against the abuse of power by the Commission by the procedural safeguards of Title 47 U.S.C., by the provisions of the Administrative Procedure Act,[15] and finally, by the right of appeal to the courts for relief from any final action claimed to be arbitrary or capricious. The petitioners are not deprived of due process by the operation of the Fairness Doctrine.

VII. Does section 315 violate the ninth and tenth amendments to the Constitution?

In four sentences in their brief (p. 20) petitioners assert that the Fairness Doctrine infringes upon the rights guaranteed by the ninth and tenth amendments. Relying upon

[15] 5 U.S.C. §§ 1001-1011 (1950).

United Public Workers v. *Mitchell*, 330 U.S. 74, 94 (1947), petitioners point out that there is therein an explicit protection of the right of the people to engage in political activity. The argument then disclaims this case as representing any authority for "so restricting the rights of the people generally or the owners or users of media of communications such as radio or the press." The conclusion is drawn that the "prior restraint occasioned by the imposition of the 'Fairness Doctrine' infringes on the guarantee of the political rights retained by the people including petitioners herein and all paying users of Petitioners' radio facilities," and "the First Amendment's prohibitions clearly fall within the Tenth Amendment" as "powers not delegated to the United States by the Constitution are retained by the people." See petitioners' brief at page 20.

Again I encounter some difficulty in applying these general allegations to the facts in this case. Accepting *United Public Workers* v. *Mitchell, supra,* with some obvious limitations, for the principle announced by petitioners, I find little in the actual holdings of the Court as to the rights of federal employees under the Hatch Act which relates to the factual situation here before us. I do not find in the operation of the Fairness Doctrine any restriction upon the rights of the people to engage in political activities, as I pointed out in some detail in part VI above. Broadcasters alone determine the programs they will carry, the format to be followed, and the personnel to be utilized in those broadcasts. In political matters, the licensee alone has "the right and non-delegable duty of . . . acting reasonably to determine whether a program . . . is in the public interest." *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F.2d 900, 906 (10th Cir. 1947). While generally a licensee is responsible for all matter carried on his station, Congress has gone so far as to relieve him of this responsibility with

respect to broadcasts by candidates for political office by stripping him of his power to censor. See section 315 and *Farmers Union* v. *WDAY*, 360 U.S. 529 (1959).

The Commission, in supporting its action in this case, construes petitioners' challenge under this point as being addressed to its requirements imposed on the licensees after the personal attack, with special reference to the mandated granting of cost-free time to the victim to respond as his financial circumstances require. If this is the thrust of petitioners' charge, I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one. The broadcasters' licenses are issued upon a finding by the Commission that the public interest will be served thereby, and thus, the licensees accept the responsibility of discharging what is in actuality their public trust. There remains to the licensee the right, in the exercise of good faith discretion, of utilizing a paying spokesman to respond to a personal attack if one is available. But:

> ". . . [W]here the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (and does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the contrasting viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation." (Emphasis in original.) *Cullman Broadcasting Co., Inc.*, 25 P & F Radio Reg. 895, 896 (1963).

I conclude that there is no abridgement of petitioners' rights in the application of the Fairness Doctrine to their activities in this case. In so doing, I have considered the entire record in an effort to perceive and understand the petitioners' ninth amendment claim, despite

the vague and general nature of their brief upon this point. I observe further in this regard the paucity of cases defining, enumerating, or interpreting ninth amendment rights. Mr. Justice Goldberg, speaking in a concurring opinion in *Griswold* v. *Connecticut*, 381 U.S. 479 (1964), cites but three Supreme Court cases treating of the ninth amendment during the entire period of the Court's existence, supplemented by two "see also" citations. 381 U.S. at 490-1.

Mr. Justice Stewart, while dissenting in *Griswold, supra,* pointed out that:

> "The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' *United States* v. *Darby*, 312 U.S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual states." 381 U.S. at 529-30.

I apply to the petitioners' ninth amendment[16] argument Mr. Justice Stewart's statement in *Griswold, supra,* at 529, "but to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."

The thrust of the tenth amendment argument attempts to place section 315 within the ambit of powers not delegated to the United States by the Constitution. The threshold weakness of this contention is that the Supreme Court has affirmatively held that the broadcasting system established by Title 47 U.S.C. is a proper exercise of the constitutional power of Congress over commerce, *National*

[16] For additional citations to discussions of the origin of, reasons for, and applicability of the ninth amendment, see *Griswold*, 381 U.S. 489, 490, 491, and footnotes thereon.

Broadcasting Co. v. *United States, supra,* and in enacting Title 47 U.S.C., Congress must be deemed to have exercised its power within constitutional limitations. *Sablowsky* v. *United States,* 101 F.2d 183 (3rd Cir. 1938). I have discussed in part V of this opinion the right of Congress, under established precedents, to delegate the administration of statutory provisions to agency determination. It follows, then, that Congress having acted herein under specifically identified constitutional power, approved by the Supreme Court, properly delegated execution of its statutory mandate to the Commission. Therefore, there exists in this case no transgression of any power reserved to the states or the people. "If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments must fail." *United Public Workers* v. *Mitchell, supra,* at 96.

VIII. Does the Fairness Doctrine impair free speech in violation of the first amendment by imposing a prior restraint upon the expression of views, arguments, and opinions by petitioners, as well as by all other owners of radio stations, and upon those who pay for the use of such facilities?

Beginning with citations and irrefutable quotations relating to the purposes, the meaning, and the breadth and scope of the Bill of Rights, and especially of the first amendment, from *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Board of Education* v. *Barnett,* 319 U.S. 624 (1943); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Grosjean* v. *American Press,* 297 U.S. 233 (1936); *Near* v. *Minnesota ex rel Olson,* 283 U.S. 697 (1931); and *McIntire* v. *William Penn Broadcasting Co. of Philadelphia,* 151 F.2d 597 (3rd Cir. 1945), *cert. denied,* 327 U.S. 779 (1946), the petitioners contend that the Fairness Doctrine, measured against the principles of those cases,

imposes a direct and previous restraint upon the right of free speech guaranteed by the first amendment. This results, say petitioners, from the Doctrine's restraining a licensee from speaking out editorially on issues of public importance except on condition that he seek out and grant free time to another to express oppositorial views. Further restraint arises, they say, because an owner of a station "may not permit his facilities to be used by a paying citizen to speak out in opposition to governmental action or policy unless such owner makes available free time commensurate with the paid time to voice the contrary view." It follows, say petitioners, that the Fairness Doctrine creates "previous restraint [and the] fear of subsequent punishment" through danger or threat of the forfeiture of the licensee's license. Beyond this the petitioners further argue they are forced by the Doctrine to surrender "as a pre-condition to the obtaining of a radio station license," their right of freedom of speech and are, finally, compelled to assume the "unlawful obligation" of becoming the "first censor" of all public interest broadcasts at the risk of ultimate loss of their broadcasting license at renewal time if their censorship is not to the liking of the Commission.

I begin, then, with an examination of the reasons advanced by the respondents for the formation and operation of the Doctrine:

> "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the [constitutional] rights." *Schneider* v. *State,* 308 U.S. 147, 161 (1939).

First, then, I set forth in the several following paragraphs the respondents' reasons, advanced in brief and oral argument, for the regulations constituting the Fairness Doctrine.

Radio broadcasters, state the respondents, by utilizing

the limited number of publicly-owned broadcast facilities and operating on a license valid for a limited period, carry on their programs as trustees for the public at large because of the Commission's determination that each licensee's operation will promote the public interest. The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, *id est,* the public, of the different attitudes and viewpoints which are held by the various groups which make up the community. The first amendment establishes an informed electorate as the foundation stone of a democracy.

> "In presenting programs dealing with controversial issues of public importance, the fairness doctrine imposes upon licensees the affirmative obligation to afford reasonable opportunity for the expression of conflicting viewpoints. As such, it is reasonably related to the statutory scheme which provides that licenses are issued for limited times to persons who act not in their own private interest, but as 'trustees' for the public's interest in 'the larger and more effective use of radio,' 47 U.S.C. 303(g)."[17] Respondent's brief at 21.

The "public interest," continue the respondents, having been consistently sustained by the courts as a valid standard to guide the Commission in the exercise of its prescribed duties, has been made more precise by the incorporating into the Communications Act of 1934 of the fairness principle. A broadcast station, not being a common carrier, and having both the duty and the right of determining whether a controversial program is in the public interest, must, after having exercised that determination by broadcasting a particular program, in the public inter-

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[17] 47 U.S.C. § 303(g) (1962) reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

est afford equal opportunity for the broadcast of the other side of that controversial issue. This burden exists equally well when the initial broadcast consists of a personal attack upon a person or organization. The crucial consideration is the public interest in hearing both sides. The licensees' obligation to present both sides does not arise from the factual truth or falsity of the broadcast, because in the application of the Doctrine the ultimate determination of the merits of the issue will be made by the general public for whose information, presumably, the initial broadcast was originally made.

> "[The freedom of speech guaranteed by the First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Association Press,* 52 F.Supp. 362, 372 (L.Hand, J.) (S.D.N.Y. 1945), *aff'd* 326 U.S. 1 (1945).

Against this backdrop and the entire record, I do not find in this case the existence of any "prior or previous restraint." Concise or even broad definitions of the factual situations or practices which constitute a prior restraint are non-existent within the wide scope of the Court's review of first and fourteenth amendment cases. Certainly, however, any type of Government censorship imposed prior to permitted publication is an abrogation of first amendment guarantees. *Joseph Burstyn, Inc.* v. *Wilson, supra; Schneider* v. *State, supra; Grosjean* v. *American Press Co., supra.* Similarly, a licensing program operating in fact as a censorship program constitutes a first amendment violation. *Burstyn, Inc.* v. *Wilson, supra.* Accepting readily the obvious fact that other situations could constitute a prior restraint, I confine my discussion to the facts in the present case. The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. Their latitude in the selection of pro-

gram material, program substance, program format, and identity of program personnel is bounded only by their own determination of the public interest appeal of their end product. They are not required to submit any broadcast material to the Commission, or any other Government agency, prior to broadcast. It is obvious that there is involved in this case no censorship which constitutes prior or previous restraint. It seems almost superfluous for me to have to point out that section 326 specifically prohibits any censorship action on the part of the Commission.

Turning, then, to the licensing scheme incorporated in Title 47 U.S.C., I observe readily that no provision whatsoever requires the license applicant to waive, forego, or sacrifice the liberty to discuss, when licensed, publicly all matters of public concern. Consideration of public interest, convenience, and necessity are alone the prescribed existing and operational standards for eligibility for issuance of a broadcast license. Although petitioners allege that a fear of punishment may constitute a de facto restraint upon the exercise of their free speech guarantees through a denial of their ultimate renewal application, I point out—as I have done before in this opinion—that the remedial provisions of Title 47 U.S.C., the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from any illegal, arbitrary, or capricious conduct on the part of the Commission. Petitioners have full access to the ground rules governing the Fairness Doctrine, since they have been printed in the Federal Register, 29 Fed. Reg. 10416, and furnished to all broadcast licensees. Broadcasters have full opportunity to answer any complaint against their station, *Letter to Oren Harris, supra,* and may request a ruling from the Commission if they are in doubt whether a particular set of facts is within the Doctrine. *Cullman Broadcasting Co., supra.* Finally, I observe that the

Commission has recorded its position against the invocation of sanctions against any broadcaster for an honest mistake in judgment. *Report, supra,* at 1246 and *Capitol Broadcasting Co.,* 2 P & F Radio Reg. 2d 1104 (1964).

Weaving together the several threads of discussion presented in this section of this opinion, I conclude that there is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgement of his free speech rights. I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by the use of modern technology the "free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens," *Grosjean* v. *American Public Press, supra,* at 249. Having found no violation de jure or de facto of petitioners' rights, I am absolved from further consideration, at least in this case, of the reasons advanced by the Commission for the existence of the doctrine (referring back, of course, to the doctrine of *Schneider, supra*).

Conclusions

1. 47 U.S.C. § 315 (1962) adopted the Commission's Fairness Doctrine, as set forth in the Commission's 1949 *Report, supra,* and in so doing, the Congress did not commit an unconstitutional delegation of its legislative function.

2. The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights.

3. Neither 47 U.S.C. § 315 (1962) nor the Fairness Doctrine is violative of the ninth or tenth amendments to the Constitution.

4. Under the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution or is the Doctrine violative of either the ninth and tenth amendments.

The Commission action under review is

Affirmed

FAHY, *Circuit Judge:* I concur in the result reached by Judge Tamm and in general with his reasoning, without committing myself to all details of the opinion. For example, I have doubts that the fairness doctrine "recognizes and enforces the free speech right of the victim of any personel attack made during the broadcast." I agree with the Commission without finding it necessary to accede to this position.

Moreover, I agree with the Commission that a reply to a personal attack is not conditioned upon the ability of the licensee to obtain paid sponsorship for the reply. As to the procurement of sponsorship I need go no further than the case of a personal attack.

WILBUR K. MILLER, *Senior Circuit Judge,* did not participate in the consideration and decision of this case on the merits, set forth in the foregoing opinion.

[Filed June 13, 1967]

[Caption omitted]

On Petition to Review and Set Aside an Order of the Federal Communications Commission.

Before: Wilbur K. Miller, Senior Circuit Judge, and Fahy* and Tamm, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel. On November 22, 1966, the court filed opinions and a judgment dismissing the petition for review. On December 21, 1966, respondents filed a petition for rehearing en banc and petitioners filed an answer thereto. On March 13, 1967, the court entered an order vacating the opinions and judgment filed November 22, 1966, and ordered that the case shall remain with the assigned division of the court for a decision on the merits of the petition. On reconsideration of the entire record and the argument of counsel, it is

ORDERED and ADJUDGED by this court that the action of the Federal Communications Commission on review in this case is affirmed.

Per Circuit Judge Tamm

Dated: June 13, 1967

Separate opinion by Circuit Judge Fahy concurring in the result. Senior Circuit Judge Wilbur K. Miller did not participate in the consideration and decision of this case on the merits.

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* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

SUPREME COURT OF THE UNITED STATES

No. 600 ——, October Term, 1967

RED LION BROADCASTING CO., INC., ETC., ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

Order Allowing Certiorari

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.